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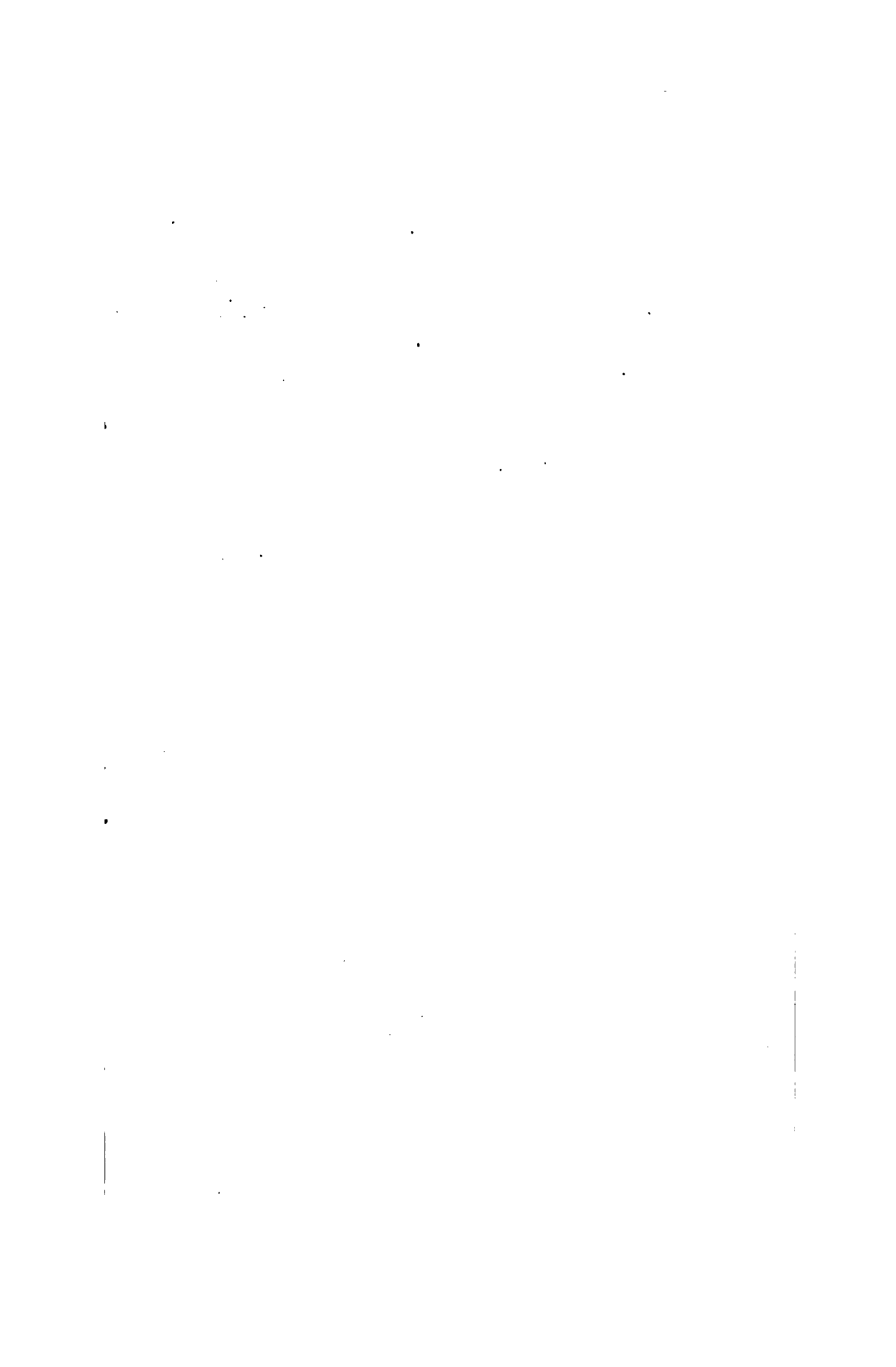
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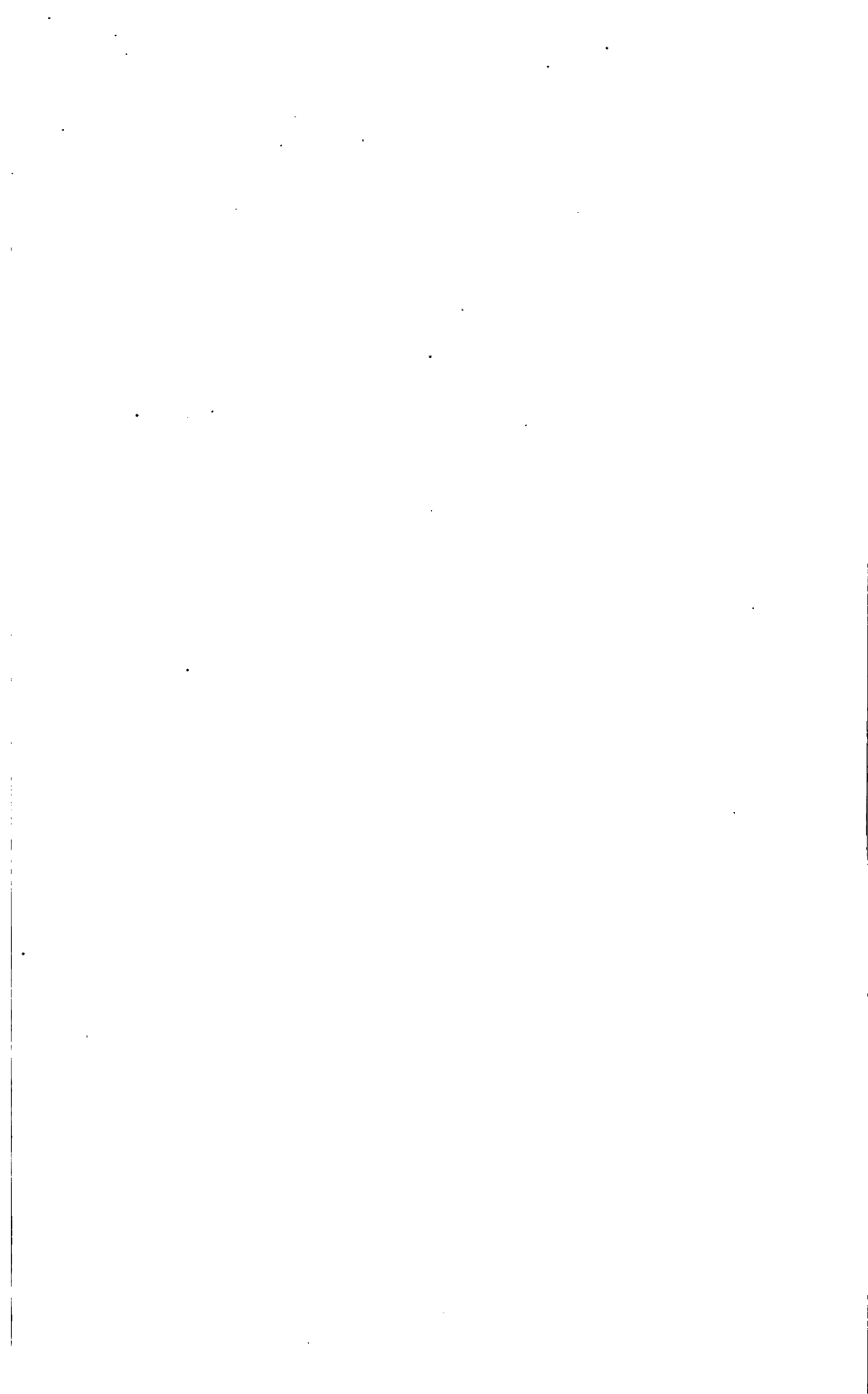
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# CASES

DECIDED IN

THE HOUSE OF LORDS,

ON APPEAL

FROM THE COURTS OF SCOTLAND,

1830.

REPORTED BY

JAMES WILSON AND PATRICK SHAW, ESQUIRES,  
ADVOCATES.

VOLUME IV.

WILLIAM BLACKWOOD, EDINBURGH;  
T. CADELL, AND M. STEVENS & SONS, BELL YARD,  
LINCOLN'S INN, LONDON.

MDCCCXXXII.



THE LORD CHANCELLORS LYNDHURST AND BROUGHAM, EARL  
ELDON AND LORD WYNFORD, HAVE DONE THE REPORTERS  
THE HONOUR TO REVISE THEIR SPEECHES IN THIS VOLUME.

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# CASES

DECIDED IN THE HOUSE OF LORDS,

ON APPEAL FROM THE

COURTS OF SCOTLAND,

1830.

The MAGISTRATES of EDINBURGH, and the GOVERNORS of No. 1.  
HERIOT'S HOSPITAL, Appellants.—*Campbell—Simpson.*

DICKSONS BROTHERS, Respondents.—*Spankie—MacDougald.*

*Reparation—Superior and Vassal.—Held, (affirming the judgment of the Court of Session), That superiors who had fenced out ground for building to a considerable extent in streets, and constructed a common sewer or drain for the use of the streets, and, long subsequent to the conveyance of the feus, acknowledged dominion over the drain, by stipulating with a third party to keep it in repair, were liable for damage occasioned by the disrepair of the drain.*

DICKSONS BROTHERS, nurserymen, had for many years been the tenants of a piece of nursery ground belonging to Heriot's Hospital, situated on the east side of the Broughton Road, near Edinburgh, but on a lower level than that road. The main drain or common sewer from York Place, Albany Street, Forth Street, Broughton Place, and other streets in that quarter of Edinburgh, had, since the year 1797, when York Place was built, run down under a flag-stone cover towards the north, by the side of the Broughton Road, till it emptied itself into a grating at the corner of the nursery ground; after which, it continued its course to the eastward in an open ditch. Some years before 1822, the water in the drain displaced the flag-stone cover, about a hundred yards higher up the Broughton Road than the nursery; and although the ordinary run of the sewage still kept its course in the drain, there was always, on occasion of sudden and violent rains, an overflow at this rupture.

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Feb. 17. 1830. On the 4th of June 1822, one of these showers fell, and was noticed in all the newspapers as one of the most violent thunder-showers in the memory of the oldest person living. The drain was quite inadequate to carry off so sudden and immense a rush of water, which therefore ran down the road; and not passing freely at the grating, rushed through the hedge upon the nursery ground, overflowed it, and did considerable injury to the plants. Dicksons Brothers then presented a petition to the Sheriff, first against Heriot's Hospital, and subsequently against the Magistrates of Edinburgh, as superiors of the streets making use of the drain, praying for indemnification of the damage sustained, and for repairs or enlargement of the drain by the Magistrates and the Hospital, in respect that they, or either of them, constructed the drain, in reference to which they had feued out their property into streets, and thereby, by their own act, greatly increased the drainage upon the inferior properties. They farther alleged, and without contradiction, that the Magistrates, in 1806, induced the trustees of the road to remove an interdict obtained by them on some operations at Bellevue, in the immediate neighbourhood, by agreeing to alter the form of the common drain on the Broughton Road, and keep it in repair in all time coming.

The Magistrates and Hospital stated in defence, that they were only superiors of the streets; and that, whether they constructed the drain or not at first, it was no longer theirs, but belonged to the feuars, who made use of it, and who, having the commodum, were subject to the onus: That this was true, whether the right of the feuars was to be viewed as property or servitude; for, in the latter view, the feuars, as the owners of the dominant tenement, were bound to keep the subject of the servitude in repair: That neither the Magistrates nor the Hospital had undertaken any obligation relative to the drain,—the lands having been made over to the respective feuars precisely as held by themselves: That the dimensions of the drain, and extent of the streets, had long been before the pursuers' eyes, as had the rupture of the flag-stone cover, and nevertheless they had never complained; and had even renewed their lease without complaining.

On the other hand, the pursuers maintained that the defenders were liable, because, 1st, The defenders had made the drain, and were proprietors of it; 2d, They had crowded their lands with buildings, and let in other drains without challenge, besides those coming from their own feus; 3d, They drew large feu-duties, and therefore ought to bear the burden in question; 4th, They had

feued out the grounds on a plan relating to the drain; and, 5th, The Magistrates had bound themselves to the road trustees, to keep the drain in repair, to prevent damage in another quarter.

The Sheriff, (27th June 1822), before answer, remitted to Mr George Nicol, nursery-gardener, who reported upon the amount of the damage; and the Sheriff then pronounced the following interlocutor:—‘ Finds that the defenders, the Magistrates of Edinburgh, and the Governors of Heriot’s Hospital, when they feued their grounds in York Place and the adjoining streets, ought to have taken care that proper drains were constructed for carrying off the water and fuilzie from the different feus on the grounds feued out, without any damage to the inferior grounds; and are, therefore, liable for any damage which may have been done to the pursuers in consequence of the drains for carrying off the water and fuilzie from their feus not having been properly constructed: Before further answer, remits to Mr Robert Stevenson, civil engineer, to make a survey of the sewers and drains from the said feus, and of all other sewers and drains falling into the common drain running under the Broughton Road complained of, whether these come from the feus of the defenders or not; and to report as to the original construction, and present state of repair, of the said sewers and drains, and of the common drain; and, in particular, whether the damage to the pursuers has been occasioned by any of the said sewers or drains having been either originally improperly constructed, or being now in bad repair; and to specify the particular sewers or drains thus improperly originally constructed, or presently in bad repair; and to state in his report the manner in which the faulty sewers or drains should either be constructed or repaired; and also, in the event of the common drain not having been constructed for properly and effectually carrying off the fuilzie and water conveyed into it by all the other sewers and drains, or, being now in a bad state of repair, to specify how it ought to be constructed or repaired: Also, of new remits to the said Mr George Nicol to inspect the pursuers’ premises, and to report, *quam primum*, as to the amount of additional damage sustained by the pursuers in consequence of the floods which have taken place since the date of his last report; reserving entire all questions as to the liability of the present defenders, or any other person, to repair the said sewers and drains, or to indemnify the pursuers for said damage.’

Both defenders reclaimed without success. Mr Stevenson re-

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ported as follows : ‘ The present state of disrepair in which this  
 ‘ drain has for some time been, independently of its smallness, is  
 ‘ one of the chief causes of the flooding of the nursery grounds :  
 ‘ Because, instead of the drainage waters being at once conducted  
 ‘ by a close drain of proper dimensions into the open ditch upon  
 ‘ the southern side of Nursery Lane, they are wholly discharged  
 ‘ upon the public road ; and, during heavy falls of rain, the small  
 ‘ eye or aperture at the point marked B on the plan, measuring  
 ‘ only about nine by twelve inches, which communicates with this  
 ‘ ditch, is constantly exposed to be suddenly choked. The ac-  
 ‘ cumulated drainage of the district is consequently allowed to  
 ‘ collect on the public road, in the hollow at the western extremi-  
 ‘ ty of Nursery Lane ; and being here cut off by the stoppage at  
 ‘ the point B from the open ditch, the water thus collected dis-  
 ‘ charges itself into the grounds of the pursuers, which are unfor-  
 ‘ tunately considerably under the level both of the public road and  
 ‘ of Nursery Lane. By this means, the damage complained of is  
 ‘ from time to time incurred, and must continue, until at least the  
 ‘ lower part of the drain under Broughton Road is enlarged, and  
 ‘ properly connected with the open ditch on the southern side of  
 ‘ Nursery Lane. It seems farther necessary to the reporter, that  
 ‘ a stone wall of about fifty-five yards in length should be built  
 ‘ along the northern side of Nursery Lane, to connect with that  
 ‘ already built on the western side along the public road, to pre-  
 ‘ vent the surplus water, which may still collect near the point B,  
 ‘ from falling into the nursery ground, through the roots of the  
 ‘ thorn hedge, even after the completion of a proper drain under  
 ‘ Broughton Road. This dike being extended eastward round a  
 ‘ turn in Nursery Lane, a drain should be formed at its eastern  
 ‘ extremity across the lane, to conduct such surplus waters into the  
 ‘ open ditch. The expense of the proposed arched elliptical drain  
 ‘ from Albany Street down to the open ditch at Nursery Lane,  
 ‘ being about three hundred and ten yards in extent, is estimated  
 ‘ at L.3 per lineal yard ; it will cost L.930. Should your Lord-  
 ‘ ship, however, be of opinion, that it will be sufficient to carry the  
 ‘ proposed elliptical drain from the open ditch till it joins the  
 ‘ drain under Broughton Road, at or near the point marked A  
 ‘ upon the plan, where the drain is still entire, then the distance,  
 ‘ being only about one hundred and ten yards, will cost the sum  
 ‘ of L.330 ; and the proposed wall on the northern side of Nur-  
 ‘ sery Lane, similar to that on the western side, is estimated at the  
 ‘ rate of 18s. per lineal yard, or L.49. 10s. for fifty-five yards.’

On this report the Sheriff (20th January 1823) pronounced Feb. 17. 1830.  
 the following interlocutor:—‘ Finds it instructed by Mr Stevenson’s report, that the drains constructed for carrying off the water and fuilzie from the feus in York Place were sufficiently ample for that purpose; but that, when the drains from the feus in the adjoining streets were allowed to communicate with the York Place drains, the lower part of the Broughton Road drain ought to have been proportionally enlarged, so as that the original drains should be rendered sufficient for carrying off the water and fuilzie from all the different streets whose drains were allowed to communicate with the York Place drains: Finds it sufficiently instructed by said report, that the flooding of the grounds occupied by the pursuers was directly occasioned by the imperfect state of the common drain under the Broughton Road, both in regard to its dimensions, and the ruinous state of its lower compartment: Therefore, decerns against the defenders, as representing Heriot’s Hospital, and the Town of Edinburgh, conjunctly and severally, for the sum of L. 24. 8s. 6d. sterling, being the amount of the damages sustained by the pursuers previously to the date of the original application, as ascertained by Mr Nicol’s report, No. 16. with interest thereof from the date of citation: Farther, finds the defenders, conjunctly and severally, bound to rebuild and repair the drains in question, in the least expensive of the two modes pointed out by Mr Stevenson; and ordains them to do so at the sight of Mr Stevenson, within three months from this date: Finds the defenders, conjunctly and severally, liable in expenses; reserving to the pursuers to raise an action against the defenders for the damage sustained by them subsequent to the date of the original application in this process; and also reserving to the defenders their relief against each other, according to the value of their respective feu-duties in the streets in question, or in any other competent manner; reserving also all claim the defenders may respectively have against their feuars, and to the feuars their objections as accords, and decerns.’ To this interlocutor the following note was added:—‘ If the defenders are dissatisfied with this interlocutor, they can try the general question of their liability in the Court of Session; and their doing so may render it unnecessary for the pursuers to bring any action for the damage sustained since the date of the petition.’

The defenders having reclaimed, the Sheriff pronounced (19th

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\* From an overflow by a subsequent heavy rain.

**Fa. 17. 1830.** March 1823) the following interlocutor :—‘ Recalls the interlocutor of 20th January last, in so far as it finds the defenders, conjunctly and severally, bound to rebuild and repair the drains in question in the least expensive of the two modes pointed out by Mr Stevenson, and in so far as it ordains them to do so at the sight of Mr Stevenson, within three months from the date of the said interlocutor: Quoad ultra refuses the petitions, and adheres to the said interlocutor; reserving to the defenders their relief against Messrs Burn, Forsyth, and Jollie, and others, who have feued out for building the ground, streets, or areas, the drains from which have been allowed to communicate with the main drain from York Place down Broughton Road, and against the feuars of the said Messrs Burn, Forsyth, and Jollie, and to the said Messrs Burn, Forsyth, and Jollie, and their said feuars, their objections as accords.’

Thereafter the defenders complained by advocacy to the Court of Session of the judgments of the Sheriff. Lord Mackenzie as Ordinary repelled the reasons of advocacy, remitted the case simpliciter to the Sheriff, and found the defenders liable in expenses. His Lordship added the following note :—‘ It appears to the Lord Ordinary, that the Hospital and the Town having feued their property upon plans connected with this drain, were bound to the neighbouring proprietors, to one another, and to the public, on account of the road, to keep the drain, or see it kept, in proper condition; and that the respondents having obtained their lease, had right to the benefit of this obligation, both against their own landlords, the Governors of the Hospital, (who must be held to have undertaken to fulfil this duty in favour of their own land so let), and against the Town, which was bound to all parties acquiring real right in that land. It appears, then, that the respondents having suffered damage from neglect to perform this obligation, must have right of reparation against both the advocates.’

On advising representations for the defenders, his Lordship issued the following note :—‘ The Lord Ordinary wishes to have more precise explanation respecting the feus granted by the Hospital. It seems now to be stated, that the Hospital never feued out for building any of the ground held from them, and now connecting with the drain in question, but feued away all this ground by ordinary feus, without reference to any drain, to vassals who have sub-feued it for building at their own hand. This appears a new statement, and, if correct, seems material. The Lord Ordinary wishes explanation also respecting the feus granted by the Town of Edinburgh; for the Magistrates now

‘ seem to aver, that the Town did not feu by a plan with refer- Feb. 17. 1830.  
 ‘ ence to this drain, as made, or to be made, by the superiors  
 ‘ so feuing, or even with reference to such drain at all, as a  
 ‘ thing to which the feuars were to have right, and to be bound  
 ‘ to use. Indeed, the Magistrates do not seem now distinctly to  
 ‘ admit that the Town feued for building at all. All these matters  
 ‘ of fact must be cleared up.’

Thereafter his Lordship ordered condescendences, ‘ of what  
 ‘ they aver and offer to instruct with respect to the feuing out of  
 ‘ the ground on which the houses communicating with the drain  
 ‘ running down Broughton Road stand; and on the conditions  
 ‘ of such feus with regard to the drainage, and the ground or  
 ‘ drainage plans, if any, with reference to such feus.’

On advising these condescendences with answers, his Lord-  
 ship refused the representations, and adhered to the interlocutor  
 represented against.

On reclaiming petitions and answers, the Lords of the Second  
 Division, on the 7th December 1826, adhered, and found ex-  
 penses due.\*

The Magistrates and Heriot's Hospital appealed.

*Appellants.*—1. The pursuers have failed to establish that the  
 damage in question was occasioned by the disrepair of the drain.  
 On the other hand it is evident, that the sudden deluge of rain  
 which occasioned the overflow, and which was of the nature of  
 a *damnum fatale*, would have done so even if the drain in its  
 then construction had been perfectly entire; for it would have  
 done so by the run of water on the surface of the road. The  
 drain, when entire, could not carry more than the drain full; the  
 rest must have run on the road; and every drain in or near  
 Edinburgh upon that occasion overflowed.

2. The defenders were not liable for damages to the pursuers for  
 not having a larger drain, in as much as the pursuers had been te-  
 nants in their nursery garden for many years, with the drain, such  
 as it was, before their eyes, and had made no complaint; and had  
 more than once renewed their lease, even since the rupture of the  
 drain, without any stipulation on the subject. Moreover, the drain,  
 in its then construction, was a source of profit to the pursuers, in  
 respect of the manure which they were enabled to collect from it;

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\* See 5. Shaw and Dunlop, No. 61. p. 94.

Feb. 17. 1830. an advantage which they would have lost, if the sewage water had been carried past their nursery grounds in a large covered drain.

3. Supposing that the damage had been occasioned by the state of the drain, and that the drain had been constructed by the defenders, or either of them, it is contrary to every principle of feudal law to hold the superiors connected with the drain, after they have conveyed the feus to the feuars. The drain is for the exclusive benefit of the latter; they alone use it, and reap the benefit of it; and are responsible for the effects of over-using it, on the principle '*cujus commodum ejus onus*.' It has been said that the common drain is not within the property of the feuars, and that they cannot, therefore, get access to it to repair it: but the answer is, that their right to use it is a right of servitude, not of property; and that as they, and not the superiors, are the owners of the dominant tenements, namely the feus, they, and not the superiors, are bound to keep the subject of the servitude in repair, and of course to pay all damage arising from its disrepair. Neither do the specialties on which the pursuers rely affect these general principles; and there is no authority or precedent for the plea, that it would have required an express stipulation to bind the feuars to keep the drain in repair. An express stipulation would be requisite to render the superiors liable; but the vassals, the owners of the dominium utile, and the sole parties benefited by the drain, were bound, by the established principles of law, to uphold it. It is true, that the drain was formed by the defenders; but this is of no relevancy, because it merely shews that they had constructed the subject of the servitude. And neither is it relevant to allege, (what is no doubt true), that the Magistrates had, subsequently to conveying the feus, entered into an agreement with the road trustees in relation to this drain.

LORD CHANCELLOR.—It appears to me, that the fact which the learned Counsel has just stated, would in the absence of other circumstances be decisive of this case, namely, that the appellants have exercised an actual dominion over this drain, deciding what persons should have authority to make drains to communicate with this, so as to increase the quantity of water to pass through it. If they have by any act on their part occasioned this damage, they are answerable for it.

*Simpson*.—I submit, that the Magistrates of Edinburgh could not compromise the rights of Heriot's Hospital.

LORD CHANCELLOR.—It is quite clear, that they were all acting together on those occasions, as to the communication of the new with the old drain. It appears to me, that they have clearly made themselves jointly liable. The House do not feel it to be necessary to hear



the Council for the respondents. It is sufficient to shew that the evil arises in consequence of the original defect in the construction of the drain,—I mean by that, the construction of the drain with all the accessories to it. That being established, I think there is an end of the case; and I shall move your Lordships to affirm the decree of the Court of Session. Feb. 17. 1830.

*Spankie*.—I hope your Lordships will affirm it with costs: We are contending with very rich bodies—The whole town of Edinburgh belongs to these two bodies; they have immense funds.

**LORD CHANCELLOR**.—I am of opinion, that there ought to be costs. This is an appeal from the unanimous judgment of the Court below; and I see no reason at all to quarrel with the principle of the judgment. I move your Lordships, that the judgment be affirmed with L.60 costs.

The House of Lords accordingly ordered and adjudged, that the interlocutors complained of be affirmed, with L.60 costs.

*Appellants' Authorities*.—*Stair*, 2. 7. 8. *Ersk.* 2. 9. 5. and 2. 9. 12. and 2. 6. 1. *Parson of Dundee v. English*, July 1687, (14,521.)

*Respondents' Authorities*.—*Stair*, 1. 9. 5. *Ersk.* 3. 1. 15. *Gray v. Maxwell*, July 30. 1762, (12,800.) *Downie v. Earl of Moray*, June 19. 1824, 3 *Shaw and Dunlop*, 158. and Nov. 12. 1825, *Ib.* 4. 169.

**SPOTTISWOODE and ROBERTSON—MACDOUGALD**,—Solicitors.

**ARCHIBALD FARQUHARSON**, Appellant.—*Brougham—Alderson*. No. 2.

**MISS FRANCES BARSTOW**, Respondent.—*Campbell—Jarvis*.

*Usury*.—Where L.12,000 of Government stock, of the value of L.7620, were sold for an heritable bond of L.10,000, with interest thereon at 5 per cent; but the payment of the principal was dependent on, and substantially affected by several contingencies; and, in one view, the seller and her heirs were exposed to receive for a perpetuity less than 5 per cent on the sum sold;—Held, (affirming the judgment of the Court of Session), that the transaction was not usurious.

*Title to Pursue*.—Circumstances of confidence between the seller and purchaser of an estate burdened with a bond, found to be no bar to the title of the purchaser to challenge the bond on the head of usury.

**MISS FRANCES BARSTOW** was possessed of L.12,000, three per cent consols. In 1797 she came to reside in the family of Mr and Mrs Russell of Blackhall, paying board, and contributing to the expense of part of the common establishment. She was a cousin of Mrs Russell, and placed much confidence in the

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Feb. 17. 1830. friendship, honour, and business talents of Mr Russell, who had studied law, and passed at the Scotch Bar. She had also been in the use of giving more or less to him, the temporary command of her funds.

After some communing as to an arrangement proposed to be adopted in relation to the L. 12,000 stock, the following heritable bond was, in 1803, drawn and written by Mr Russell himself; executed by the parties; and delivered into the possession of Miss Barstow; but there was no evidence that she consulted any professional man on the subject:—‘ I, Francis Russell of Black-

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\* Previous to the bond being granted, Mr Russell wrote to Miss Barstow in these terms: ‘ 1st, On your part, you are to assign over to me, in full right for ever, your right and interest in L. 12,000 three per cent consolidated Government annuities, with the dividends accruing due thereon in July next 1803 years, as part of the sum. 2dly, On my part I am bound to give you, and your heirs or executors, ample mortgage security for the sum of L. 10,000 sterling money of Great Britain, as on the 20th day of June next 1803 years, with interest from and after that day and term, during the whole period I shall be due the said sum of money, at the rate of 5 per cent per annum, payable half-yearly every 20th day of December and 20th day of June for the half-year respectively preceding; beginning the first half-yearly and termly payment upon the 20th day of December next 1803 years, for the half-year immediately preceding, and so on half-yearly, paying to you L. 250 sterling every half-year, while I remain debtor in the said principal sum of L. 10,000 sterling. 3dly, That, during your life, I shall, at your pleasure, be bound to hold the said sum of money, and to pay you interest therefor, at the rate of 5 per cent yearly, and payable as above half-yearly in equal portions, and that unless interest of money shall be reduced by law to a lower rate. 4thly, That it shall not, however, be lawful for you to demand or exact payment of the said principal sum from me or mine, until two years after it shall be signified to me, by a writing under your own or your agent’s hand, that the said 3 per cent consolidated Government annuities are currently sold at the Stock Exchange in London, to the broker for purchasing up the National Debt, or other public character, in sums exceeding in the course of a year one million of said stock, at the rate of L. 83. 10s. sterling for each L. 100 of said 3 per cent consolidated annuities: But that, in six months after I have received said notice, it shall be lawful for you, at any time during the whole course of your life, to demand, and I shall be bound to pay up the whole of said principal sum. 5thly, But that it is fully agreed and settled between us, that in the event of said principal sum remaining due at the time of your decease, or of mine, that no greater part of said principal sum than L. 2000 sterling shall be payable on demand in a shorter period than two years thereafter; and that the remaining L. 8000 shall be payable in two equal instalments of L. 4000 each, at these periods,—the first at four years from such event, and the last at six years from such event; and that it shall not be in the power of either your heirs, or executors or successors, to demand payment in any shorter or other terms or portions. 6thly, That in case and in the event of your marriage, I shall, in one month thereafter, be bound to pay you L. 6000 sterling, provided the 3 per cents have reached but 75 per cent; and at all times, on forty days’ notice, I shall be bound to pay you, for any want and purpose of yours, L. 1000 sterling, on either of such payments being properly discharged in part of my bond and mortgage in your favour.’ Miss Barstow answered:—‘ March 21. 1803.—Dear Sir, I received a letter from

‘hall, advocate, hereby grant me to have borrowed and received, Feb. 17. 1830.  
 ‘and to be, at the date of these presents, justly resting owing  
 ‘and indebted to Miss Frances Barstow, only daughter,’ &c. ‘in  
 ‘and of the sum of ten thousand pounds sterling money of  
 ‘Great Britain, whereof I hereby acknowledge the receipt, re-  
 ‘nouncing all objections to the contrary: Therefore, I hereby  
 ‘bind and oblige myself, my heirs, executors, and successors  
 ‘whomsoever, (renouncing all benefit of discussing them in or-  
 ‘der), to content and repay to the said Miss Frances Barstow,  
 ‘or to the executors or trustees now appointed, or to be ap-  
 ‘pointed by her, for carrying into execution the disposal of her  
 ‘property and effects at her decease, either by her last will or  
 ‘settlement now actually made, or by any latter will or settle-  
 ‘ment which she may at any future period of her life think fit to  
 ‘make, expressly barring and secluding all other heirs, and all  
 ‘other executors, the said sum of ten thousand pounds money afore-  
 ‘said, and that at and against the terms, and under the condi-  
 ‘tions after mentioned, with penalty,’ &c.; ‘and with the due and  
 ‘ordinary interest or annualrent of 5 per cent per annum of the  
 ‘said principal sum, from and after the 20th day of June next, &c.  
 ‘and that at two terms in the year, viz. the 20th day of December  
 ‘and 20th day of June, by equal portions, beginning the first  
 ‘term’s payment of the said interest upon the 20th day of De-  
 ‘cember next, for the half-year immediately preceding, and the  
 ‘next upon the 20th day of June thereafter; and so forth termly  
 ‘and proportionally, during the not-payment of the said princi-  
 ‘pal sum,’ &c. ‘with penalty; but always with and under the fol-  
 ‘lowing conditions and provisions: And it is hereby expressly  
 ‘conditioned and provided by me, That it can or shall in no

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‘you, dated the 16th of this month, containing the particulars of a bargain proposed  
 ‘between us, which I again repeat I think greatly for my interest and advantage,  
 ‘of which the following are particulars;’ and after reciting the particulars in the  
 exact terms above quoted, she closed the transaction in the following terms:—‘I  
 ‘have only to declare, that the above-written articles of an agreement are entirely  
 ‘agreeable in conformity to what has been settled between us; and I hereby oblige  
 ‘myself to execute what is incumbent upon me in consequence of this agreement, by  
 ‘assigning the said L. 12,000, 3 per cent consols, in your favour, as soon as a proper  
 ‘security can be made out and executed by you in my favour, in the terms of your  
 ‘letter above referred to: And as the said 3 per cent stock does not at this time sell  
 ‘above 63 and a half per cent, I cannot but consider this transaction as much to my  
 ‘advantage; and therefore, in case at the period of my decease the said bond shall re-  
 ‘main unpaid, it is my desire and request, and thereafter, until it shall sell so that the  
 ‘said L. 12,000 shall yield the sum of L. 10,000 sterling, that it shall remain in your  
 ‘hands at the rate of 3½ per cent, until that price can be obtained.’

Feb. 17. 1890. ' case be lawful for the said Miss Frances Barstow, or her  
' above written, or any other in her name or right, to call upon  
' me for repayment of the said principal sum of ten thousand  
' pounds money foresaid, and that neither I nor my foresaids  
' shall be bound to repay the same, beyond the sum of two thou-  
' sand pounds thereof in an event herein after specified, until the  
' space of two full years and six months has elapsed from and  
' after the day on which the Government stock or fund denomi-  
' nated 3 per cent consolidated annuities shall have been pub-  
' licly and currently sold at the Stock Exchange in London, to  
' the broker employed by Government for purchasing up the na-  
' tional debt, or other public character or agent, in sums exceed-  
' ing in the course of one year one million of said stock, (the  
' said term of delay to count and run, however, from the first  
' day on which any sum to the amount of twenty thousand of  
' said stock shall be so purchased), at the rate and price of  
' eighty-three pounds ten shillings sterling for each or every hun-  
' dred pounds stock in said consolidated annuities, nor until six  
' months after I shall have received a notice and requisition in  
' writing, subscribed by the said Miss Frances Barstow, or her  
' agent, or her above written, that said stock has been sold two  
' days before the date of said notice at the above rate, and re-  
' quiring me to pay up said principal sum in six months there-  
' after, the amount and notoriety of the sale being as above de-  
' scribed; declaring nevertheless, that, in the event of the said  
' Miss Frances Barstow her marriage, I shall be, and am bound,  
' in two months after such event, to pay to her the sum of six  
' thousand pounds sterling, to be credited to me, however, in the  
' payment of the sums contained in the bond, at the rate at which  
' the 3 per cent consols shall then sell; that is, allowing in my  
' favour whatever they then sell for below eighty-three pounds ten  
' shillings per hundred pounds stock; and that at all times, and  
' for any purpose of her's, I shall be constantly bound in one  
' month to pay up to her any sum not exceeding one thousand  
' pounds sterling, on the same terms as above expressed, in the  
' event of her marriage; and both or either of such payments  
' being first duly discharged to me, as in part payment of the  
' money due by me in virtue of this bond and obligation: it be-  
' ing, however, expressly conditioned and provided on my part,  
' that, in the event the principal sum shall remain unpaid by  
' me or my foresaids at the time of the decease either of myself or  
' that of the said Miss Frances Barstow, and that whether from the  
' circumstances of the said stock never having arisen to the said

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‘ stipulated price of eighty-three pounds ten shillings sterling per  
‘ hundred, or from her, or her above written, not having thought  
‘ fit to raise and call up the same; in either case, that no  
‘ greater part of the said principal than two thousand pounds  
‘ sterling shall be payable by me, or my foresaids, in a shorter  
‘ or less period than two years; but that such sum of two  
‘ thousand pounds, or any sum or sums not exceeding that  
‘ amount appointed by her in any will or other settlement of her’s,  
‘ shall be payable to the executors or trustees named by her as afore-  
‘ said; one thousand pounds thereof in six months from her decease,  
‘ and the remainder thereof within said space of two years next  
‘ thereafter; and that the remaining eight thousand pounds shall  
‘ be only payable by two equal portions or instalments; the one or  
‘ first in four years after such decease, and the other not until six  
‘ years after such decease: and it being further expressly provided  
‘ and declared, that, in the event of said principal sum remaining  
‘ due at the period of the decease of the said Miss Frances Barstow,  
‘ from its having never hitherto been exigible from me or my fore-  
‘ saids, in respect of the said three per cent stock having, at no time  
‘ since the date hereof, attained the said price of eighty-three and a  
‘ half per centum, then and in that event, not only as that above pro-  
‘ vided, I shall not be bound and obliged to repay said principal sum  
‘ until such price can be obtained, but also, that, after the decease  
‘ of the said Frances Barstow, I shall only be liable in, and bound  
‘ to pay interest therefor, at the rate of three and one-half per cen-  
‘ tum per annum; and it being hereby conditioned and declared,  
‘ that the said principal sum shall remain unpaid in my hands, se-  
‘ cured as hereby secured, until it arises that said three per cent  
‘ stock shall reach and attain the said stipulated price and value of  
‘ eighty-three and a half pounds sterling per hundred thereof, and  
‘ for two years and six months after such event shall so have taken  
‘ place; the said interest, however, to be payable in the portions,  
‘ and at the half-yearly terms above herein conditioned for payment  
‘ of the higher interest: And, lastly, it is hereby expressly provid-  
‘ ed and conditioned by me, and declared to be the full meaning  
‘ of the said Frances Barstow, and the condition under which this  
‘ bond and obligation is granted by me to her, that I or my foresaids  
‘ can, on no ground or pretence whatever, be obliged or compel-  
‘ led, either by herself or her above written, or by any having right  
‘ from them, to pay up the said sum of ten thousand pounds ster-  
‘ ling, sooner, or until two years and six months after the said three  
‘ per cent stock shall have attained the said price of eighty-three  
‘ and one-half pounds sterling by the hundred of such stock, other-



Feb. 17. 1830. ' wise than in the event and to the extent above specified; I being,  
' however, expressly bound and obliged, during all the days of the  
' said Frances Barstow's life, to pay her in all events the interest  
' of the said principal sum of ten thousand pounds sterling money  
' aforesaid, and that always at the rate of five per centum per an-  
' num, at the terms and in the half-yearly proportions above speci-  
' fied; and in respect of the mutual conditions, considerations, and  
' provisions hereby made, to keep and hold the said principal sum at  
' that rate of interest during all the days of her life, if she shall so  
' incline and require, and that without regard to what the ordinary  
' rate of interest may fall; and for the said Miss Frances Barstow,  
' and her above written, their further security and more sure pay-  
' ment of the sums of money, principal, interest, and penalties  
' above specified, and without prejudice to the above personal obli-  
' gation, but in farther corroboration thereof, under, nevertheless,  
' the above written restrictions and provisions in my favour, I, the  
' said Francis Russell, bind and oblige myself, and my forebears,'  
&c. Then followed obligations to infeft in the barony of Strachan  
and others, with precept of sasine and other usual clauses.

Mr Russell regularly paid the interest of the bond during his  
life. Soon after his death, in 1806, Miss Barstow took infeftment,  
and Mr Russell's widow, his general disponee, continued the pay-  
ment. In 1818 Archibald Farquharson married one of Mr Rus-  
sell's daughters, on which occasion Mrs Russell conveyed to him  
the lands, burdened with Miss Barstow's bond; and he paid the  
interest down to June 1823.

At the date of the transaction with Mr Russell, the L. 12,000  
stock was worth about L. 7,620 sterling, and produced an annual  
dividend of L. 360. The stock did not rise to 83½ until the  
lapse of fourteen or fifteen years; after that they rose much  
higher. In 1824 they were at 96.

In March 1824, Mr Farquharson brought an action of reduc-  
tion of the heritable bond, on the ground that the contract was  
usurious, and null and void by the 12. Anne, Sess. II. c. 16.  
and was also null and void under the statute, (commonly called  
the Bubble Act), 7. Geo. II. c. 8. § 1.; and concluding that the  
bond and sasine should be reduced, and the whole sums of money  
received in name of interest should be paid back to the pursuer;  
or that the principal sum in the bond should be restricted to  
L. 7,620, with legal interest thereon, and against it should be  
placed all sums received as interest from Mr Russell, Mrs Rus-  
sell, and the pursuer, which by a calculation was shown to reduce  
the restricted capital of L. 7,620, to about L. 3,768.

Miss Barstow objected to Mr Farquharson's title to pursue, on Feb. 17. 1830. the ground that he derived his title from Mr Russell, who had taken him bound to pay this debt. His obligation to pay this burden was coexistent with his title to the estate; and besides, as in the circumstances of the case Mr Russell could not have challenged the bond, so neither could Mr Farquharson. On the merits she maintained, that the transaction was not usurious, and was not affected by the Bubble Act.

The Court, on the report of the Lord Ordinary, (31st January 1827), sustained the title to pursue, but assoilzied Miss Barstow, with expenses.\*

Mr Farquharson appealed.

*Appellant.*—The question is, whether there has been usury or not, which is one purely of law, and in relation to which a plea of hardship or inexpediency is irrelevant. The inquiry is simply, what had Mr Russell received, and what had he undertaken to pay? He only got L. 7,620, in respect of which he was bound to pay L. 500 of interest annually, and he was farther bound to repay, not L. 7,620, but L. 10,000. Thus for years there was paid an interest greatly exceeding the lawful interest of the principal advanced. It was an improbable event, that the stock would rise to 83½. It is no doubt true, that open and substantial transactions in the public funds, whereby a party, on receiving a sum to-day, stipulates to pay the price of a future day, is legal; but here the shape adopted was merely a colour to conceal the vice which contaminated the whole contract. It is also true, that where there are contingencies whereby the principal, or principal and interest, are put in hazard, there is no usury; but here the contingencies were too remote and too slender to infuse legality into the arrangement. If fictitious or distant endangerments or risks, which the lender has in his own power at once to remove or avoid, were to give validity to such transactions, there would be an end to the law of usury. Neither was it meant to be contended, that a stipulation for an annuity for life, amounting to much more than legal interest on the principal, is usurious. But here the period was indefinite, and the annual sum might be exigible for a perpetuity.

**LORD CHANCELLOR.**—If it were, the whole payments of interests would be less than legal interest; since one period is definite, and

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\* 5. Shaw and Dunlop, No. 150. p. 251.

Feb. 17. 1830: the other indefinite. The parties apparently contradict themselves two or three times. But I think that you will find, that while L. 1000 may be called up, whether the stock rose to 83 $\frac{1}{4}$  or not; the rest, if the rise did not take place, would lie at three and a half per cent. By this transaction, Mr Russell is not obliged to pay the L. 10,000, until the stock he has purchased is worth that sum. In the meantime, he is to pay more than five per cent on the selling value of the stock; that is, more than legal interest: But, on the other hand, he has this advantage, that he is not obliged to pay the price whenever the stock is actually worth the L. 10,000, but he is entitled to take two years and a half longer, and, during that time, to speculate on the stock being higher; and he is to have the whole benefit of the speculation. It would appear, then, that the benefit of the chance is an equivalent for the excess of the interest.

*Brougham.*—But observe the situation in which Miss Barstow placed Mr Russell. He was not entitled to pay her, unless she consented: not only could he not do so during the lady's life, but we do not see how he could have done so after her death. As to the preliminary point, we perhaps ought to have alluded to the strange objection of personal exception, as if intimacy of acquaintance or mutual confidence could nullify the statute. But the Court below have sustained the title to pursue—with this anomaly, however, that while the Court sustain the title, they concur in every word of the opinion of one of their Lordship's number, who is quite clear that the appellant was barred; that is, that the appellant is barred, and not barred. We are bound, out of respect to the last opinion, to regard the first as an absurdity; but the Court were as clear on the one point as on the other. We have never met with any satisfactory answer to our objection, founded on the 7th Geo. II. c. 8. We have only to add, that this is not a mere question of Scotch law; we are entitled to ask, how would it be dealt with in the Courts of this country? and we submit, that there should be a remit, to ascertain how much of the principal and interest of the actual sum lent, namely L. 7620, remains due.

*Respondent.*—Neither of the statutes founded on by the appellant have any application. The bond contains numerous contingencies, which affected the principal, and controlled the recovery of it. This is not the case of an ordinary loan of money—it is a purchase of Government stock, for a price payable only if the stocks reached a certain high rate, and for an annuity if they did not. Each party had then chance of gain or of loss. Therefore the statute of Queen Anne cannot apply. Neither can the statute

7. Geo. II. c. 8.; for here the respondent sold stock of which she was actually possessed, and over which she had the sole and absolute controul. Feb. 17. 1830.

**LORD CHANCELLOR.**—The difficulty of this case arises from the conditions in the bond being so complicated. But before we can reach a sound judgment, we must be sure that we thoroughly comprehend every part of its bearing. I was looking to the letters for the contract; but I perceive that the contract itself materially differs from them, and we must take the bond as the contract between the parties. If this be a perpetual annuity, this lady would receive less than five per cent on the value of the stock; and in one event it is a perpetual annuity.

**LORD WYNFORD.**—It appears to me that there is only L.1000 which this lady was ever sure of getting back again, and that struck me a long while ago as very far deciding this case.

**LORD CHANCELLOR.**—We think, under these circumstances, that this cannot be considered an usurious transaction, and that, consequently, the judgment must be affirmed.

**LORD WYNFORD.**—I am of opinion, that there ought to be costs given in this case; though I do not agree that the party could not take the objection, yet, in my opinion, it is a most unrighteous objection.

The House of Lords therefore ordered and adjudged, that the interlocutors be affirmed, with L.50 costs.

*Appellants's Authorities.*—Comyn on Usury, 156. and cases cited. Colville, Jan. 25. 1709, (6825.)

*Respondents's Authorities.*—3. Wilson's Reports, 390.; Atkinson, 340.; Comyn on Usury, 22.; Cro. Eliz. 741.; Atk. 301.; Ambl. 371.; 5. Espinasse, 164.; Robertson's Ap. Cases, 471.

**RICHARDSON and CONNELL—A. MUNDELL,**—Solicitors.

**SEA INSURANCE COMPANY OF SCOTLAND, Appellants.**  
*Campbell—Spankie.*

**No. 3.**

**JOHN GAVIN and Others, Respondents.**—*Lushington—Brougham.*

*Insurance.*—Found, (affirming the judgment of the Court of Session), That a policy of insurance 'to Barcelona, and at and from thence, and two other ports in Spain,' &c. covered a total loss, which happened while the ship insured lay in the roadstead of Saloe, although there were no artificial works or other usual protections for loading and unloading, but the place was resorted to by vessels for trade, and it was treated as a port by the Spanish and British Governments.

Feb. 18. 1890.

2D DIVISION.  
(ADMIRALTY.)

THE Sea Insurance Company underwrote a policy of insurance on the brigantine Sarah of Leith, belonging to Gavin and others, 'at and from Leith to Shetland, and from thence to Barcelona, and at and from thence, and two other ports in Spain, to a port in Great Britain.' The Sarah, after loading with fish in Shetland, sailed for and arrived at Barcelona; but a contagious fever raging there, she proceeded to Tarragona, where she discharged her cargo. She then, in order to take in her home cargo, removed to the roadstead of Saloe, a port or place ten miles from Tarragona, and lying in the hollow of an open and exposed bay. While loading a storm arose, which drove her ashore, along with almost all the vessels lying there at the time. The Sarah was totally wrecked. Of sixty vessels in the port of Tarragona, only one was saved.

The owners claimed against the Insurance Company for a total loss; but were resisted, on the ground that the insurance covered the vessel to 'two other ports in Spain;' whereas the Sarah was lost, not in a 'port,' but in an open roadstead or 'place,'—a risk of a very different nature from the one insured, and for which a higher premium was uniformly paid.

The Judge-Admiral, (before whom the case was brought), allowed a proof; and it was established that Saloe Bay, above fifteen miles in length, is protected by Cape Saloe and the land at the north of the bay, from all winds but those from the east, round by south to west. It is not well, but as much protected as any of the ports in that part of the Mediterranean, from winds blowing up and down that sea: and although there are very few dwelling-houses, yet there are several warehouses, and a jetty commanding a depth of water suitable for feluccas, but not for large vessels. A heavy surf occasionally breaks on the shore, but there is a good roadstead and anchorage where all vessels lie trading to Saloe, and there is a port captain. The British consul, who resides at Rous, (where the merchants live),—a town about eight miles inland, and of which Saloe is generally considered as the port,—describes himself 'vice consul for the port of Saloe and its district.' There is a custom-house, (a branch of the one at Rous), with custom-house officers; but this is usual in all the accessible bays of Spain. Vessels trading to Saloe chiefly export and take their cargo on board in small craft. The situation of the Sarah was fixed by the port captain and custom-house officer. She rode in the usual anchorage, and could not without their permission have changed her position. On the other hand, at Tarragona and Barcelona there are regular moles and artificial works

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for the protection of large vessels, with deep water, and accommodation for loading and unloading, although not affording security against south-westerly gales; and when these blow with violence, the roadstead at Saloe, as possessing greater range, is preferable. Insurance brokers differed as to their opinions, whether Saloe was to be considered as a 'port,' in the meaning of the word in the policy; and it appeared that a higher premium was exacted for an insurance to 'ports and places,' than to 'ports' alone. Naval men also gave opposite opinions, whether Saloe was a 'port' or merely an 'anchorage.' The Judge-Admiral directed that the opinion of Mr Tindal of the English Bar \* should be taken.† His opinion being, that an English jury would, on the evidence, have held that Saloe Bay was a port within the meaning of the policy, the Judge-Admiral found it proved that Saloe, where the *Sarah* was wrecked, was a port within 'the meaning of the policy in question, and that the vessel was within the 'same at the time the loss took place,' and therefore decerned against the defenders.

The Insurance Company brought the case, by suspension, before the Court of Session, who (3d March 1827) repelled the reasons of suspension, found the letters orderly proceeded, and decerned with expenses.‡

The Insurance Company appealed.

*Appellants.*—The evidence shews, that Saloe Bay was not a port, 'locus conclusus,' calculated for the protection and safety of ships. There was no harbour, no mole, no security against the most dangerous and prevailing winds in the Mediterranean; no artificial works, without which the designation port is never given. Had the respondents insured to ports or places, or to ports or open roadsteads, the contract would have been different, and the premium higher. The very word 'other' shews the meaning of parties; but Saloe Bay has no resemblance to the ports of Tarragona and Barcelona.

*Respondents.*—Artificial works are not the essence of a port. It is enough that the place, basin, or anchorage, is held by

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\* Now Lord Chief Justice of the Common Pleas.

† The appellants alleged that they took the opinion of Sir James Moncreiff of the Scottish Bar, (now Lord Moncreiff), whose opinion was directly to the contrary.

‡ 5. Shaw and Dunlop, No. 268. p. 525.

Feb. 18. 1830. general usage, by the practice of traders and merchants, to be, and has by the sanction of Government assumed the character of a port, and that it is resorted to as such. This is the case with Saloe. Besides, the appellants must be presumed to have known, that a great proportion of the Spanish ports in the Mediterranean are little more than natural bays, with anchorage grounds, and protected more or less by the headlands of the crescent.

LORD CHANCELLOR.—I have carefully read these papers; and I have made up my mind, that if I had been on the jury, I would have found that Saloe was a port within the meaning of the policy; and if your Lordships are of the same opinion, I would suggest the propriety of your Lordships pronouncing an affirmance, with costs; say L. 50.

The House of Lords accordingly ordered, that the judgments be affirmed, with L. 50 costs.

*Appellants' Authorities.*—2. Taunton, 403.; 1. Marshall, 248. 276.; 2. Barnwell and Alderson, 460.; 1. Taunton, 517.; 4. Taunton, 660.; 2. Campbell, 541.

*Respondents' Authorities.*—Molloy, de Jure Maritimo; 2. Postlethwaite's Dict. 500.; Galt's Mediterranean, 102.; Comyn's Digest, voce Merchant, Marine Insurance, 208.; 1. Marshall, 6. 5.

MONCREIFF, WEBSTER, and THOMPSON—SPOTTISWOODE and ROBERTSON,—Solicitors.

No. 4.

DAVID CHARLES GUTHRIE, and Others, Appellants.  
*Spankie—Jones.*

WILLIAM ANDERSON, and Others, Respondents.  
*Campbell—Alderson.*

*Mutual Contract.*—Construction of letters constituting a mutual contract between merchants.

Feb. 18. 1830.  
2D DIVISION.  
Lord Mackenzie.

JOHN GLEN JOHNSTON was indebted to Chalmers and Guthrie, merchants in London. He indorsed to them the bills of lading of the ship Trewe, and they accepted bills drawn on them at his desire by a Russian merchant, for the price of the cargo. Johnston being in embarrassed circumstances, Anderson, and others interested in the cargo, entered into an arrangement with Chalmers and Guthrie for a surrender and transference of the bills of lading. On the one hand, Chalmers and Guthrie wrote as follows:—

‘ Messrs William Thomson and Alexander Anderson,  
‘ *Gentlemen,* *Dundee, 12th Nov. 1812.*  
‘ To fulfil on our part an arrangement for the resignation to

'you of our account with John Glen Johnston, we inclose all the' Feb. 18. 1830.  
 'bills of lading per Trewe in our possession. We credit his ac-  
 'count L. 10,000 for goods per Condrillon received, for L. 1000  
 'expected to be the balance of loss per Palmbalm; added to  
 'which, we acknowledge having this day received L. 13,000, say  
 'thirteen thousand pounds sterling, toward the settlement of our  
 'account. We are, &c.

'If the balance of Mr Glen Johnston's account ultimately be  
 'less than L. 13,000 now paid us, we hold ourselves responsible  
 'to you for the difference.'

Anderson and the others interested wrote in answer :—

'Gentlemen,

12th Nov. 1812.

'We acknowledge receipt of your letter of this date, inclosing  
 'the bills of lading per Trewe, and resigning to us all your inte-  
 'rest therein. We hereby agree to assume Mr John Glen John-  
 'ston's debt, holding ourselves responsible for the amount, and  
 'for the consequences of any possible action that may lay against  
 'you by the said Mr J. G. Johnston, his heirs or assignees.'

The cargo of the Condrillon, and the balance expected by the Palmbalm, fell short of the sum stated; and in an accounting between Chalmers and Guthrie, and Anderson and others, the question arose, whether the L. 10,000 and the L. 1000, were a fixed and absolute credit, or only an approximation to what might possibly be the proceeds of the cargo of the Condrillon and per the Palmbalm. It was agreed upon by the parties, that if the first view were taken; the appellants were due to the respondents L. 2653. 4s.; but if the latter view, only L. 1738. 8s. 7d. The Lord Ordinary and the Court of Session, (22d May 1827), adopted the first view, and decerned accordingly.\*

Guthrie and Chalmers appealed.

*Appellants.*—The account with Johnston was not fixed and settled. Guthrie and Chalmers merely struck an estimate from the data in their power at the moment; but Anderson and others were to be responsible for the real balance. Had not this been the view entertained by Guthrie and Chalmers, they would not

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\* 5. Shaw and Dunlop, No. 318. p. 694.



Feb. 18. 1830. have parted with the ample security which the bills of lading of the Trewe afforded them.

*Respondents.*—The transaction was explicitly detailed in the letters. Johnston was to be absolutely credited in L. 10,000 and L. 1000, and Anderson and others gave their bills for L. 18,000, not in any circumstances to pay more, but to receive back if the balance proved less.

The House of Lords considered the construction adopted by the Court of Session as the most fair and probable, and therefore ordered and adjudged, that the appeal be dismissed and the interlocutors affirmed.

A. GORDON—RICHARDSON and CONNELL,—Solicitors.

No. 5. ALEXANDER MEIN, (Trustee of JAMES TAYLOR), Appellant.  
*Brougham—Wilson.*

TAYLORS, and Others, Respondents.—*Lushington—  
James Campbell.*

*Fee or Liferent.*—Clause of a deed held (affirming the judgment of the Court of Session) to create a trust, so as to carry the fee to children, and a liferent to the father.

Feb. 23. 1830.  
1st DIVISION.  
Lord Corehouse.

JOHN TAYLOR of Spring-Bank executed a general disposition and deed of settlement, by which, ‘under the burdens, provisions and declarations, and for the purpose of being divided and held in manner underwritten,’ he ‘disponed his whole estate, heritable and moveable, to and in favour of James Taylor, baker and farmer in Whitburn, Thomas Taylor, farmer in Bankhead near Falkirk, Robert Taylor, baker in Glasgow, and William Taylor, grocer there, my brothers, heritably and irredeemably,’ &c. surrogating and substituting the said James Taylor, Thomas Taylor, and William Taylor, in his full right, title, and place of the whole premises, with power to do every thing thereanent which he could have done if in life. For carrying the deed into effect, he bound and obliged himself, his heirs and successors, to infeft and seize the said James Taylor, Thomas Taylor, and William Taylor, their heirs and assignees, in the whole lands and other heritages above disposed, requiring infeftment; but declaring always, that the said disposition was granted, and to be accepted by his said

Feb. 23. 1830.

disponees, under the burdens and conditions therein written, and that the said subjects should be held by them in liferent, and belong to their children in fee, in the proportions after specified. First, With and under ' the burden of his debts and provisions to ' his widow,' &c. ; and ' under these burdens my said subjects shall ' be held by my said disponees, in the proportions, and on the terms ' and conditions following : viz. My said disponees shall divide the ' same into twelve equal shares or parts ; and I hereby appoint, ' that four and one-half of these shares or parts shall be held by ' the said James Taylor in liferent, during all the days and years ' of his lifetime ; and, at his decease, the fee and property thereof ' shall be divided among the children lawfully procreated of his ' body, as follows ; viz. One equal share to each of his sons, and ' one equal share to his two daughters, Mary Taylor, spouse of ' James Ross in Carluke, and Ann Taylor, spouse of Thomas ' Grosart, late baker in Glasgow, to be divided equally among ' them ; declaring, that the survivors or survivor of my said dis- ' ponees shall see the share devised to the said Mary Taylor and ' Ann Taylor equally divided betwixt them, and the half belong- ' ing to the said Mary Taylor secured to her in liferent, and to ' her children equally among them in fee, and the other half ' secured to the said Ann Taylor in liferent, and to her children ' equally among them in fee. In the next place, I hereby appoint ' that two of the foresaid shares shall be held by the said Thomas ' Taylor in liferent, during all the days and years of his lifetime, ' and at his decease the fee and property thereof shall be divided ' equally among the children lawfully procreated of his body, ' share and share alike. In the third place, I appoint that one of ' the said shares or parts shall be held by the said Robert Taylor ' in liferent, during all the days and years of his lifetime, and at ' his decease the fee and property thereof shall belong to Eliza- ' beth Taylor, his daughter ; but if he shall leave any other lawful ' child or children, the same shall be divided among his whole ' lawful children, share and share alike : And, in the fourth place, ' I hereby appoint that four and one-half of the foresaid shares or ' parts shall be held by the said William Taylor in liferent, dur- ' ing all the days and years of his life ; and, at his decease, the ' fee and property thereof shall belong to, and be divided among ' the children lawfully procreated of his body, share and share ' alike. And I hereby provide and declare, that in case ' any of the children of my said brothers shall die, leaving lawful ' issue of their bodies, the share which would have descended ' to such deceased, shall belong to and be divided among his

Feb. 23. 1890. 'or her children equally, share and share alike: And in these terms this general conveyance of my subjects above written shall be accepted and held by my said disponees, and not otherwise.'

As this deed only contained a general obligation to execute all deeds necessary for carrying the settlement into effect, Thomas Taylor, the immediate elder brother, expedite a service as heir of conquest to John Taylor; and in that character was infest in the heritable subjects which had belonged to his brother. He then executed the necessary dispositions to himself and his brothers, narrating the disposition and settlement by John Taylor, and in terms thereof disposed the properties to the four brothers, under the special provision that they should hold them on the terms and conditions contained in the settlement. At the date of the deed, James, one of the disponees, had children alive. He thereafter became bankrupt; and Alexander Mein having been appointed trustee, instituted an action of declarator to have it found, that although James Taylor was *ex facie* of the deed only a liferenter, yet as the fee was granted to children *nascituris*, it by virtue of law vested in him.\* The children answered, that the rule of law on which the trustee founded had no application to fiduciary fees; and that, under the settlement in question, the property vested only in trust in the four brothers, who, while they enjoyed the liferent, held the principal for behoof of the fiars.

The Lord Ordinary sustained the defences, found expenses due, and issued the subjoined note, explanatory of his judgment.†

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\* The trustee did not dispute the rights and interests of the two daughters to the fee of their respective shares, because they were called *nominatim*.

† 'When a conveyance is made to one in liferent, and his children, unnamed or unborn, in fee, it is settled law that the fee is in the parent, and that the children have only a hope of succession, to prevent the infringement of the feudal maxim, that a fee cannot be in pende. It is perhaps to be regretted that the point was so settled, because the plain intention of the maker is, in consequence, often sacrificed to a mere form of expression; and the feudal maxim might have been saved by supposing a fiduciary fee in the parent, as is done when the liferent is restricted by the word *allearly* or *only*. Upon this point, however, it is too late to go back; but certainly the principle ought not to be extended to cases which have not yet been brought under it. In the present case, the subjects are not disposed to Messrs Taylor in liferent, and their children in fee, but on the contrary, to the Messrs Taylors in fee, because the obligation to infest is in favour of them and their heirs and assignees. The question therefore is, Whether the fee so given is absolute or qualified? a question to be determined by the ordinary rules of construction. It appears clearly that it is a qualified or fiduciary fee, because it is granted under certain burdens and conditions. The disponees are required to divide the property into twelve equal shares, four and a half of which are to be held by James Taylor in liferent, two by Thomas in liferent,

The Court (8th June 1827) adhered.\*

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Alexander Mein appealed.

*Appellant.*—It is an established principle in the law of Scotland, that where a liferent is vested in the parent, and the fee destined to children, either unborn or unnamed in the deed, the right of fee is held to be in the parent, and the children have only a hope of succession. If, however, the taxative word ‘*allenary*’ or ‘*only*’ be introduced, the interest of the parent is reduced to a bare usufruct, and the fee is fiduciary in him for behoof of the children. This has been fixed by a series of decisions.

*Lord Chancellor.*—You do not mean to argue, that there is nothing except the word ‘*allenary*,’ that could produce that effect?

*Wilson.*—No, my Lord; but still the rule of law is important in considering what other expressions, apparently conveying a mere liferent, have been held to amount to the conveyance of a fee.

*Lord Chancellor.*—This case seems to have been decided on the ground of the fee being a fiduciary fee. It is most material to meet the case on that ground. It is the one on which Lord Corehouse decided. Not that the facts were precisely the same in this case as in the case which he cited; but he extracted the principle of that case, and applied that principle to the facts of this case. It came afterwards before the Court of Session, and was there decided on the same principle; and therefore the material inquiry is, whether the judgment can be supported on that ground.

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‘one by Robert in liferent, and four and a half by William in liferent; and it is declared, that at the death of each liferenter his share or shares shall belong to his children. The mode of division is also distinctly pointed out. In the case of James Taylor, who had children in existence, the disponees, or the survivor or survivors, are specially directed to divide the shares of the two daughters who are named, equally betwixt them, and to secure them to the ladies in liferent, and their children in fee; and particular directions are also given with regard to the division of the shares of Robert Taylor and William Taylor; all which implies that the disposition to the Messrs Taylors is a trust to enable them to execute certain purposes. But where a fiduciary fee is given to a person, and it is directed that he himself shall enjoy the liferent, and still more clearly, when a fiduciary fee is vested in several persons collectively, and the survivor or survivors, and each of them separately is to have a liferent, such liferent must be construed a naked usufruct, in the same manner as if it had been qualified by the word *allenary*.—See the case of Seton against the creditors of Hugh Seton, 6th March 1793,’ (4219. voce *Fiar*).

\* 5. Shaw and Dunlop, No. 364. p. 779.

Feb. 23. 1890. The general rule of the Scotch law on this subject seems very clear and distinct.

*Wilson.*—We shall adopt the suggestion of your Lordships, and, refraining from saying any thing more on the rule of law, shall only further inquire, whether this is a deed so expressed as to come under the operation of the case of Seton. The soundness of that decision we do not dispute; but it was a case of direct trust. The present deed, however, is neither in form nor terms a trust-deed. On the contrary, it possesses all the qualities of a simple disposition. The property being cumulo, and the four brothers constituted joint tenants, a division was necessary: accordingly, the property is conveyed to the four brothers, for the purpose of being divided in manner underwritten. But to divide implies to convey; and the instant that there is a division and conveyance, the joint labour of the four brothers ceases. Even, therefore, if they divided and conveyed qua trustees, that trust expires with the act of division. But the property being divided, what are the interests of the parties? The deed says, the properties are to be held in manner underwritten,—the shares ‘shall be held by the said ‘James Taylor in liferent,’ not that the disponees are to hold for James Taylor in liferent. Now if, as is clear, the testator had disposed directly to James Taylor in liferent, and to the children in fee, the fee would have been in James; why should any other conclusion follow, where the testator disposes to four disponees, directing them to convey in liferent, &c.? Even if the testator intended otherwise, his intention cannot be permitted to disturb a fixed rule of law. But the manner in which he uses the word ‘descendants’ implies, that he considered the children took as heirs, and not as trust-disponees to the four brothers.

*Lord Chancellor.*—Are there any precise words necessary by the law of Scotland, for the purpose of creating a trust-deed? Is it not sufficient, if you collect from the whole tenor of the instrument, that the property is conveyed in order that certain things may be done by the parties who are grantees and feoffees? Does not that make them trustees according to the law of Scotland, as well as of England? Does not this deed, under the burdens, provisions and declarations, and for the purpose of being divided and held in manner therein and herein underwritten, give, grant, assign and dispoise, and so forth?

*Wilson.*—Very true; but if there be a trust at all, it expired when the division among the brothers took place. Then the brothers became fiars.

*Lord Chancellor.*—I ask this for information: A certain num-

ber of shares are to be held by Taylor in liferent, what is there to prevent the fee being still in the trustees? Then, at the death of James Taylor, he, holding in liferent, something further is to be done: at his death the fee of the property is to be divided among the children lawfully procreated of his body. Is there any thing inconsistent with the law of Scotland, (certainly there is not with the law of England), in the trustees having the fee, and James Taylor the liferent?

*Wilson*.—Nothing, my Lord, if the party express himself in an apt and legal form.

*Lord Chancellor*.—Then the fee is not in pendente. The case is very clear:—The testator says, ‘the survivors of my said disposees shall see the share devised to Mary Taylor and Ann Taylor equally divided between them;’ and when it is said, ‘at his death the real property shall be divided,’ that imports that it is to be divided by the trustees. But if there be a trust continuing during the life of James Taylor, how can the fee be said to be in pendente?

*Wilson*.—If that be your Lordship’s view of the import of the deed in question, it will be difficult to oppose the judgment.

*Lord Chancellor*.—I have been of that opinion from the beginning. Mr Brougham argued the case extremely well and fully in all its points, except this; he passed it over very gently. I was glad to hear his dissertation on the law; but by passing over this point so lightly, he confirmed me in my opinion, and satisfied me that he felt as I felt.

On *Dr Lushington* opening for the respondents,—

*LORD CHANCELLOR*.—Although this is not a formal trust-deed, I consider it to be one substantially. In the case of the creditors of Frog, which has been referred to, a legal subtlety prevented the fee vesting in the children nascituri. That is avoided here by the appointment of trustees. I consider that the trust, as far as relates to the fee, remains in the trustees, and the liferent in the particular individual, James Taylor. Under these circumstances, it is quite unnecessary to apply the general rule; and this seems to have been the ground upon which the case was decided below. That is my opinion as one of your Lordships; and if the rest of your Lordships are of that opinion, we may save time and go no further.

The House of Lords ordered that the Interlocutors complained of be affirmed.

*Appellant’s Authorities*.—Cases under head ‘*Mar.*’ (4238—4297.) Creditors of Frog, Nov. 25. 1735, (4262.) *Macintosh*, Jan. 28. 1842, (F. C.) *Wilson*, Dec. 14.

Feb. 23. 1830. 1819, (F. C.) Maxwell, June 7. 1822; 1. Shaw and Dunlop, No. 590. Kennedy, Feb. 19. 1825; 3. Shaw and Dunlop, No. 378. Dewar, Feb. 5. 1821; affirmed May 5. 1825, 1. Wilson and Shaw, No. 161.

A. DOBIE—MACDOUGALD and CALLENDER,—Solicitors.

No. 6.

TRUSTEES of JOHN BROWN, Appellants.

MARY BROWN, Respondent.

*Foreign—Res Judicata.*—Judgment having been pronounced in a competent Court in the United States of America, finding a Scotch legatee entitled to a legacy under a settlement executed in the United States of America by a Scotchman domiciled there;—Held, (affirming the judgment of the Court of Session), That, under the circumstances, an offer to prove by the opinion of American Counsel, that the clause in the settlement conveying the legacy did not import a right of fee, but only of life, was inadmissible.

*Agent and Principal.*—Circumstances under which it was held, (affirming the judgment of the Court of Session), That a party receiving money as attorney of another was bound to lay it out at interest within six months thereafter, and was liable in 5 per cent for all money not so laid out; and that he was entitled to a commission of 2½ per cent on the money received by him.

March 3. 1830.

1st DIVISION.  
Lords Alloway  
and Eldin.

WILLIAM BROWN, a Scotchman, domiciled in the United States of North America, died at Richmond in Virginia in 1811. He was survived by his father and mother, James and Mary Brown, and by three sisters, Jean (Mrs Muir), Isabella (Mrs Black), and the respondent Mary Brown, all residing in Scotland. By a will dated in 1805, he declared, that ‘the remainder of my estate, after deducting therefrom the above legacies, is to be divided in the following manner: viz. To my father and mother, James and Mary Brown of Kirkcudbright, North Britain, I leave one-fourth share of the balance of my estate; to them or the survivor of them. To my sister Jean Muir, Kirkcormick, in Galloway, Scotland, I leave one-fourth share of the balance of my estate, at her death to be equally divided between her children. To my sister Isabella Black, of Castle Douglas, Scotland, I leave one-fourth of the remainder of my estate, to be at her death equally divided between her children. To my sister Mary Brown, Kirkcudbright, North Britain, I leave the remaining one-fourth share of the balance of my estate, at her death to be equally divided between her children, should she have any.’ He had also a nephew, John Brown, the natural son of a deceased brother, to whom he left a small special legacy.

The will was regularly proved in America, and the testator’s father and mother administered to some funds which he had in

England. In February 1815 the father and mother executed a deed of settlement, by which they conveyed to the survivor their right and interest in the will. In February 1816 the father died. About the same time the respondent Mary, and her sister Jean with her husband, instituted a suit in the federal Chancery Court of the United States for the Virginia district, in which a decree was pronounced on the 24th of May 1816, setting forth that the defendants, ' John Brown (the nephew), and Margaret ' Brown (the mother), administratrix, with the will annexed, ' of the said William Brown, being out of this country, and ' the plaintiffs appearing to have proceeded against them in the ' mode prescribed by law against absent defendants; and they still ' failing to appear, on motion of the plaintiffs by Counsel, the ' Court doth take their bill for confessed as to these defendants; ' and the said cause coming on to be heard this day as to the ' other defendants upon the bill, their answers and an exhibit was ' argued by Counsel. On consideration whereof the Court is of ' opinion, that the said Jean Muir, Mary Brown, and Isabella ' Black, by the will of the said William Brown, the exhibit referred ' to, are entitled each to one-fourth of the estate remaining of the ' said William Brown, after the payment of the just debts, and the ' legacies, amounting to ten thousand dollars, bequeathed to others; ' but that the payment of the share of the said Jean Muir and Isabella Black ought not to be made, unless security be given that ' at their respective deaths their said shares should be divided ' amongst their children, as provided by the will of the said testator; and doth accordingly adjudge, order, and decree, that the ' defendants, Archibald Robertson and William Black, surviving ' executors of the said William Brown, do pay to the said Mary ' Brown one-fourth of the residuary estate of the testator, and to ' the said Robert Muir and William Black, in right of their respective wives, each one-fourth of the said residuum, upon their ' severally executing, in person or by their attorney, bond, to be ' deposited with the clerk of this Court, payable to the said surviving executors, in the penalty each of seventy thousand dollars; ' with condition, that at the deaths of their said wives their said legacies shall be divided amongst their children, as provided by ' the will of the said testator: and liberty is reserved to the parties ' to apply to the Court for a settlement of the account of administration of the executors of the said William Brown, and such ' farther directions as may be necessary; and the Court doth further adjudge, order, and decree, that the cost of this suit be paid ' out of the residuum of the said testator's estate.'

March 3. 1830.



March 3. 1830.

In the course of the same month, the mother had consulted an English Counsel, (Sir Arthur Pigott), as to whether the bequest to Mary conferred on her the fee or liferent of the fourth share of the residue; and he gave his opinion, 'that Mary Brown took 'only the interest for her life. If she never had, and will not now 'have any children, the share of which she took only the interest 'for her life is undisposed of, and seems therefore to have vested 'in the testator's father, subject to being divested on the contingency of the birth of a child or children of Mary Brown, at any 'time during her life, or in due time afterwards.'

In October of the same year, Mary and her mother executed a power of attorney in favour of Archibald Robertson, (one of the executors in America), and John Brown, (the nephew), each for her respective right under the settlement, and taking them bound to account directly for their intromissions.

On the 24th May 1817, the mother made a deed of settlement, by which—on the assumption that the share bequeathed to Mary had vested in her husband, and now belonged to her under their joint deed of settlement—she conveyed to John Brown 'all 'my right and interest to the fee of the said one-fourth share of 'my said son William's property, conveyed to my said daughter 'Mary, and that failing her having a child or children.' Under the power of attorney, John Brown obtained payment of about L.5000 of Mary's share by remittances from America, and of L.1652 of funds in England from the mother, as her son's administratrix. For this latter sum, Mary, along with John Brown (with whom she resided), concurred in granting a discharge on the 11th November 1817 to the mother, in which Mary was described 'as liferenter,' and John as 'claiming right to the fee in 'virtue of settlements executed by the said James Brown and 'Margaret his spouse.' Three days thereafter she subscribed a deed, by which she discharged John Brown of the above sum of L.1652, on condition of his paying to her an annuity of L.50. This proceeded on the narrative, that according to the opinion of English Counsel she had merely a liferent; and that being addicted to the intemperate use of spirituous liquors, she might be defrauded by some designing persons. It was declared, that the annuity should only be payable while she resided with him. At this time she was about fifty years of age.

In March 1818, an action of declarator of marriage was raised against her by one Johnstone, from which she was absolved both by the Commissaries and by the Court of Session, in respect that,

being in a state of intoxication, she was unable to give a valid consent.\* March 8. 1830.

In 1819, the decree of the United States having been brought under review, John Brown was (according to the form of that country) again called as a party; but not having appeared, it was affirmed as to Mary's share, but reversed on other points.

Pending the proceedings at the instance of Johnstone, Mary Brown raised an action against John Brown, calling on him to count and reckon for the sums received by him on her behalf, both from America and from England, as her share of her brother's succession.

In defence he pleaded, 1. That as the funds (if truly her's) belonged to her husband Johnstone, she had no title to pursue; and that at all events the action ought to be sisted till the issue of the declarator; but the Lord Ordinary (Alloway) repelled the plea, 'in respect the pursuer is entitled to take any measures for the security and recovery of her property, and especially what is necessary for her own subsistence, and cannot be barred from doing so until her alleged assignation by marriage be established;' and to this judgment the Court, on the 23d May 1822, adhered.† Thereafter John Brown died, leaving a trust-deed, and his trustees (the appellants) were sisted in his place. They then maintained, 2. That under the will she had merely a liferent, as appeared from Sir Arthur Pigott's opinion; and that at all events they would prove that such was the case by the opinion of American lawyers. 3. That she was barred from maintaining that she had right to the fee, because she had admitted that she had only a liferent, both in the discharge to the mother and in the deed of annuity. 4. That with regard to the L. 1652, she had assigned it in respect of the annuity to John Brown: and, 5. That he was entitled to a commission on all the money received by him, to an allowance for general trouble, and to a sum for her board while residing with him. The Lord Ordinary found, that by the plain import and meaning of the words of the testament, as well as by the judgment of the competent Court in Virginia, where the testator died, (obtained to regulate the conduct of the executors), and which stands unchallenged and unaltered, the fee of the legacy in question is vested in the pursuer, Mary Brown, who, by the assent of both parties, is long past the period of having children: That the construction of this American will cannot be affected by the opinion of any English Counsel, as it must be judged of solely by the laws of America: That

\* 2. Shaw and Dunlop, p. 495.

† See 1. Shaw and Dunlop, No. 463. p. 426. where, for Mary Proven, read Mary Brown.

March 3. 1830. ' the defenders, as the representatives of the late Mr Brown, are  
 ' accountable for the whole amount of the principal sums drawn  
 ' by him as attorney for Mary Brown, in virtue of this American  
 ' settlement; and they must account for the principal sum, and  
 ' the legal interest thereof, from the time the same came into  
 ' Mr Brown's hands, allowing him a reasonable time for stocking  
 ' out the same: That with regard to the L. 1652, for which it is  
 ' alleged that an annuity of L. 50 was granted, as it is said that this  
 ' bond was put upon record, and an extract of it has been produced,  
 ' it is necessary for the pursuer to raise a summons of reduction of  
 ' that bond, as even the strong objections stated thereto cannot be  
 ' received ope exceptionis; therefore, quoad this sum, sists pro-  
 ' cedure until this summons of reduction can be brought and re-  
 ' mitted to the present process: That the defenders are entitled to  
 ' charge a reasonable and moderate commission upon all the sums  
 ' which the late Mr Brown received as the attorney for Miss Brown;  
 ' in consequence of the power of attorney under which he acted:  
 ' That they are also entitled to charge a moderate sum for Miss  
 ' Brown's board during the time that she resided at Netherwood:  
 ' That they are likewise entitled to charge such a sum for expenses  
 ' and postages, as have been incurred by the late Mr Brown during  
 ' the time he acted in virtue of the power of attorney from the pur-  
 ' suer, and which have not been fully indemnified by the charge  
 ' for commission: That with regard to the agent's accounts, dis-  
 ' bursed by the late Mr Brown on account of the pursuer, the de-  
 ' fenders are entitled to deduction thereof: That the pursuer is  
 ' entitled to insist that the whole of these shall be taxed by the  
 ' auditor, as betwixt agent and client;' and remitted to an ac-  
 ' countant to report on these principles. To this judgment the  
 ' Court, on the 23d June 1825, adhered.\*

In the meanwhile, Mary Brown brought an action of reduction of the deed of annuity, in which Lord Eldin, after recalling an order by Lord Kinneder that the opinion of English Counsel should be taken, pronounced this interlocutor:—' Finds, That if the opi-  
 ' nion of any foreign lawyer were necessary or useful, the opinion  
 ' of an American lawyer, as being best acquainted with the Ame-  
 ' rican law, ought to be taken; and the Lord Ordinary sees no  
 ' reason whatever to presume that the English lawyers are profes-  
 ' sionally acquainted with the laws of America. On the contrary,  
 ' the Lord Ordinary has very strong reasons to believe, that the  
 ' American law has, since the establishment of American inde-

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\* See 4. Shaw and Dunlop, 108.

'pendence, been mixed and involved with so many new rules and institutions, that it may now be considered as a system totally different from that of the English law: Finds, That from the nature of William Brown's settlement, which is very simple and clear, the construction put upon it by the respondents is apparently false, absurd, and incredible: And finds, that it has been asserted by the representer, that the settlement was regularly brought before an American Court of law, which gave judgment in the representer's favour; and finds, that no sufficient answer has been made to that assertion. Therefore, in the reduction, reduces, decerns, and declares, at the instance of the representer, in terms of the reductive conclusions of the original libel.' To this judgment his Lordship adhered, but substituted the words 'ill founded,' for 'false, absurd, and incredible;' and the Second Division, on the 27th May 1825, refused a reclaiming note.\*

March 3. 1830.

\* See 4. Shaw and Dunlop, 42.

The following opinions, as delivered in that case, were laid before the House of Lords:—

*Lord Justice-Clerk.*—Had there been no proceedings in America, the proper course would have been to ascertain what the law of that country was; and as that was the place where the deed was executed, it should be regulated by the law of that country. All that is said here is, that the matter was to be brought under review of that Court; and this gentleman (John Brown) went out to America, in order, I presume, to give in a reclaiming petition, or get a re-hearing; but whether it has been given in, or whether he has been heard, I cannot say. At any rate, as the Courts there have decided in Miss Brown's favour, and the trustees have produced no evidence of a reversal of that decision, I have no difficulty in adhering to the interlocutor of the Lord Ordinary.

*Lord Robertson.*—The question here depends upon the interpretation which you think proper to put upon William Brown's deeds. I agree with my Lord Eldin and my Lord Alloway; and the pursuer, and indeed all parties agree, that the fee of this is vested simply and absolutely in Mary Brown herself; and the deed under reduction is apparently disposing of that fee; and that is, and what was represented in America. I agree with Lord Eldin, that no satisfactory answer is made to Miss Brown's assertion, that the settlement was regularly brought before an American Court of law, which decided in her favour. As to the opinion of English Counsel,—this gentleman, (Sir A. Pigott), no doubt stands very high in his profession as an English lawyer; but I do not conceive that the opinion of any English lawyer whatever can regulate the law of America; and I think his Lordship did right in recalling that part of Lord Kinneuder's interlocutor that ordered a case to be prepared and made up for the opinion of English Counsel. There is an argument which is dwelt upon a good deal, which is, that, at all events, this lady is barred personali exceptione from insisting in her action. I confess I was somewhat surprised to find a plea of this kind maintained by the representatives of John Brown; for his knowledge of his relative was, that she was given to no common propensities and habits of intemperance; and it certainly, if true, affords sufficient evidence of the facility of this lady; and yet the representatives of this Mr John Brown contend that she is barred, personali exceptione, from insisting in this action, in consequence of having granted this deed, when, at the same time, they bring

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Thereafter, the Lord Ordinary, on advising the accountant's report in the action of count and reckoning, with objections, found, 'that six months is a proper and sufficient allowance of time for 'stocking out the money: That no interest can be charged against 'the defenders till the lapse of that period after the receipt of 'that money; but that interest at five per cent is thereafter due: 'That, in terms of the accountant's report, two and a half per cent 'is a sufficient commission on the sums recovered, and that 100 'guineas fall to be charged as an allowance for Mr Brown's 'management of the pursuer's other concerns: That the defenders 'are entitled to charge Miss Brown's board at the rate of L. 150 'yearly, of consent of the defenders; and of new remitted to the 'accountant, to make up an exact state of the sums due, accord-

forward evidence of the facilities by which she might have been induced to grant any deed.

*Lord Pitmilly.*—I am entirely of the same opinion; and I need not take up your time in going over what has already been stated, as the ground upon which I have formed that opinion. I think the decree is quite decisive.

*Lord Alloway.*—I take the same view of this case with the rest of your Lordships, and shall only express my opinion upon another branch of it. I agree with your Lordships, that this case was decided in the most formal and regular manner in 1816. The American Court proceeded on bill and answers, (which, until very lately, your Lordships know, were the very terms formerly used in this Court, being synonymous with petition and answers), and Counsel were also heard for both parties. Now, the decree of this foreign Court is completely established in this way:—This judgment was pronounced in 1816; and they say they were to bring the sentence again under the review of the American Court; but they never attempted it. There is a letter, so late as in March last year, which mentions that they have never attempted to get it altered; and I must say, it is quite a singular coincidence in the case, to found on a deed granted by this woman, whereby she gives up no less a sum than L. 1653 for an annuity of L. 50 per annum, and to say that is sufficient to bar this action. If there was no other ground to shew her facility than this, this of itself is quite sufficient, viz. the acceptance of an annuity of L. 50 a-year for this sum, which annuity, in the circumstances, is not worth two years' purchase. As an annuity, therefore, it is impossible to state that it is not a most atrocious and injurious transaction to this poor woman; and, after stating and alluding to the state of facility which this lady was under, which is done in the narrative of the bond, to raise a plea of homologation on that deed, shews no small hardihood in the trustees. But your Lordships will pay no regard to it. No doubt, when I was in the Outer House, I was quite clear with regard to the ground of proceeding—that, as Lord Ordinary, I had no power to reduce that deed without a formal process of reduction; and, accordingly, I sisted that part of the case, till a formal reduction should be brought. But, upon the whole, my Lord, I never saw a more hopeless case than this, and, from the way in which it was connected with the former proceedings, a more atrocious.

*Lord Robertson.*—And, my Lord, the bond also declares that the annuity should be forfeited if she did not remain at Netherwood.

*Lord Alloway.*—It was not to be supposed that she would reside long there.

'ing to his report, as modified and altered by the findings in this March 3. 1830.  
'interlocutor.'

Afterwards, in terms of the accountant's second report, the Lord Ordinary decerned against the defenders (appellants) for payment of L. 4350. 14s. 10½d. with full expenses; and the Court adhered, but modified the expenses to L. 200.

John Brown's trustees appealed.

*Appellants.*—The respondent was only a liferentrix, and had no right to the fee of the fourth share left to her by William Brown. Such, the appellants averred, was the construction of William's settlement by the law of America. Lawyers of that country, therefore, ought to have been consulted on the question. The judgment in the Court of Chancery was pronounced in absence, and was not intended to ascertain this precise point. Besides, the respondent is barred by homologation; and the judgments were erroneous in charging the appellants with 5 per cent interest, and allowing a commission of only 2½ per cent.

*Respondent.*—The fee of the legacy was vested in the respondent. The opinion of English Counsel is plainly incorrect and irrelevant, and is contradicted by the opinion of American Counsel.\* But the point has already been decided in the Court of Chancery; and if John Brown was absent, he had afterwards, if he disputed that judgment, an opportunity to have been heard. Under the circumstances of the case, the acts of homologation imputed to her are of no consequence. On the other points the judgments are quite correct.

LORD CHANCELLOR.—My Lords, There was a case argued some time since at your Lordships' Bar, in which Robert Gordon and others,

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\* Mr Johnston, a Virginian Counsel of eminence, gave his opinion thus:—'I think that the intention of the testator was to give to his sister, Mary Brown, this legacy, without any other limitation than that which depended on the contingency of her having children. The generality of the words giving the legacy, would have carried the whole interest of the legatee, but for the contingent limitation, should she have any; and it seems to me, that no implication fairly arises from the limitation, which, on the failure of the contingency, would restrain the bequest to the life of the legatee. The difference between the case of Mary Brown and her sisters is this:—The sisters had children at the time of the bequest, who took a vested interest at the death of the testator. Mary Brown had no children: the testator was aware of it; he was aware also of the uncertainty of her having any; and therefore employs a conditional phrase, in limiting her legacy to her children at her death.'

March 3. 1830. the trustees of John Brown, were the appellants, and Mary Brown was the respondent. This, my Lords, was the case of an appeal from certain interlocutors of the Lord Ordinary and the First Division of the Court of Session in Scotland. The main question in the cause arose out of the will of William Brown, who appears to have been by birth a Scotchman, but he had resided a considerable time at Lynchburgh in Virginia. Being domiciled in that country, he had made his will in 1805, and died in the year 1811. By that will he bequeathed as follows:—(His Lordship then read the clause already cited; *supra*, p. 28.) James Brown was the grandfather of John Brown. John Brown was the illegitimate son of a younger son of James Brown by Margaret his wife. James Brown, in the year 1815, by a deed granted by himself and by Margaret, conveyed to John Brown all his interest in the one-fourth share that he had under the will of William Brown his son, together with any other interest that he might be entitled to under that will, or in right of representation or otherwise of his son William. James Brown died in 1815; and after his death Margaret Brown, who was his widow, executed in 1817 a deed of confirmation of the former deed of disposition of the property made by her conjunctly with her husband James Brown.

Some time after the death of William Brown, a suit was instituted in the Chancery Court of the Virginia district in America, by the present respondent and one of her sisters, Jean Muir, who was one of the residuary legatees under the will. In that suit, in the month of May 1816, a decree was pronounced, and the decree, as far as is necessary to state it, or to adhere to it for the purpose of the present cause, was in these terms. It decreed, that in consideration of the premises, 'the Court is of opinion that Jean Muir, (one of the sisters, and one of the plaintiffs in that suit), Mary Brown, and Isabella Black, by the will of the said William Brown, the exhibit referred to, are entitled each to one-fourth of the estate remaining of the said William Brown, after payment of the just debts, and the legacies, amounting to 10,000 dollars, bequeathed to others; but that the payment of the share of the said Jean Muir and Isabella Black' (both of them having children) 'ought not to be made, unless security be given, that, at their respective deaths, their said shares should be divided amongst their children, as provided by the will of the testator; and doth accordingly adjudge, order, and decree, that the defendants, Archibald Robertson and William Black, surviving executors of the said William Brown, do pay to the said Mary Brown one-fourth of the residuary estate of the testator, and to the said Robert Muir and William Black, in right of their respective wives, each one-fourth of the said residuum, upon their severally executing in person, or by their attorney, bond, to be deposited with the clerk of Court, payable to the surviving executors, in the penalty each of 70,000 dollars, with condition, that on the death of their said wives their legacies shall be divided amongst their children.' So that,

according to this decree, as far as related to the present respondent, she having no children, it was directed that she should have her one-fourth share of the residue paid to her absolutely; but as to the other sisters, they having children, and with reference to the terms of the will, it was directed that the executor should pay them also their fourth shares, or that he should pay the husbands their fourth share, on security being given that, on their deaths, those shares should be divided among their children, agreeably to the dispositions of the will. This decree was pronounced in the month of May 1816. March 3. 1830.

In the month of October in the same year, a power of attorney was executed by the present respondent, Mary Brown, authorizing John Brown, and Robertson, one of the executors, to receive on her account the money that she should be entitled to under the will of the testator; and in pursuance of that power of attorney, and in conformity with the decree to which I have adverted, the money was afterwards, to the amount, I believe, of between four and five thousand pounds, (the precise amount is not material), paid over to John Brown, as the attorney for Mary Brown. It seems, therefore, extremely difficult to say that Mary Brown is not, under these circumstances, entitled to an account against John Brown for the money he has so received—money received in pursuance of a decree of a competent Court in America, pronounced upon the subject of this will in a suit instituted for that purpose, directed to be paid over, and received by John Brown, under a power of attorney for that purpose from Mary Brown. It is said, however, that Mary Brown is entitled only to a life interest in this property; and, that she being entitled only to a life interest in this property, that the residue was disposed of, and that it would pass therefore to James Brown, the father, and through that father, by virtue of the dispositions to which I have adverted, namely, the settlement made by him and Margaret Brown, and the subsequent confirmation by Margaret Brown, that it would pass to John Brown. For the purpose of establishing that that was the true construction of the will, a document was offered in evidence—the opinion of an English lawyer upon that subject, and an English lawyer undoubtedly of eminence in this country;—but the Court in Scotland justly observed, that they had nothing to do with the law of England; and that there was no evidence in the cause to shew that the law of Virginia corresponded with the law of England, with regard to the matter in question, with respect to the rules by which an instrument of that kind was to be construed; and therefore they paid no attention to the opinion relied upon on the part of the appellants.

It was farther urged, and a petition was presented for that purpose, that the opinions of American lawyers of that particular district of America should be taken, for the purpose of guiding the consideration of the case. The Court, however, rejected that petition; and I think they were right in doing so, under the circumstances of this



March 3. 1830. case. The question with respect to the construction of the will had been before the Court in America. In the year 1816, they had pronounced in effect a judgment as to the construction of that will; for they had decreed that Mary Brown was entitled absolutely to this property—they had directed that property to be paid to her; and it was paid accordingly to her agent, appointed by her to receive that which she was entitled to under the will. It seemed, therefore, under these circumstances, and after so long an interval of time, not right again to postpone the cause, for the purpose of taking further evidence as to the real and proper construction of the will.

It was urged, however, that John Brown ought not to be bound by that decision: he was a party to that suit, his name was upon the record; but the decree was made in his absence—he was in England at the time the decree was pronounced. Although your Lordships, sitting here, cannot be apprised precisely of what the law of America is in this respect; yet it is not unreasonable to suppose, that if what John Brown alleged is correct—that the decree was made in his absence—he might have gone to America, and obtained a re-hearing of that decree. It is not suggested in these papers, that John Brown was not apprised of that decree at the time it was pronounced in the year 1816: he had received from the executor the money under that decree; he had taken no steps from the year 1816, for a period of ten years, to call that decree in question; and therefore I think the Court below rightly judged, that they might take that decree as the foundation of their judgment, and decide accordingly.

My Lords, there was another point also insisted upon, to which I shall beg leave also shortly to advert. It was stated, that Mary Brown had herself admitted, that she was in fact only entitled to a life interest of this property. The facts of the case, as far as they relate to this point, are very shortly these:—A part of the property of William Brown was in England. Administration, with the will annexed, was taken out by Margaret Brown, the mother, in regard to that property, and the surplus of that property, after discharging liabilities, amounted to L. 1650; and that L. 1650 was paid over to Mary Brown, or rather was paid into the hands of John Brown. At the time when that transaction took place, a deed was executed between John Brown and Mary Brown, in the recital of which it was undoubtedly stated, that Mary Brown was entitled only to a life interest; and she conveyed the whole of her interest in this property to John Brown, for an annuity during her life of only L. 50, with this clause and condition, that that annuity should be payable to her only during the time that she resided with him. It is a part of the case on behalf of the respondent, that she was a woman of weak understanding, liable to be controlled and governed and imposed upon by persons round her; and there are circumstances, to which it is unnecessary for me to advert at present, with respect to her having gone away with a man of inferior condition of life, imposed upon, and

induced to enter into a marriage, afterwards considered null by the Court in Scotland, to which I will not particularly advert; but it is quite evident that she was a woman of weak understanding, and the Court below judged that transaction to be a fraud practised upon her by John Brown, and not growing out of the deed itself. The L. 1650 were, by the terms of that deed, to be absolutely assigned to John Brown, in consideration of the equivalent of only L. 50 a-year; that payment of L. 50 to be suspended in the event of her not residing with John Brown. I think, therefore, that the Court judged rightly in considering this transaction as fraudulent, and that the recital in the deed ought not in any degree to operate to the prejudice of Mary Brown. My Lords, I presume that, under these circumstances, your Lordships will be disposed, as to this part of the case, to be of opinion that the Court of Session came to a right conclusion, in considering that John Brown, and afterwards his trustees upon his death, were liable to account for the money which had been so received from the executors of William Brown under the will to which I have adverted. March 3. 1830.

My Lords, there were other subordinate points in the cause, consisting of matter of detail in the progress of it, particularly with respect to the mode of taxing the account, as to the allowances to be made on the one side and the other, as to the costs, as to the charges, and other matters of that description, which were argued at great length at your Lordships' Bar. I confess, that at the time the argument was going on, I had little doubt as to the propriety of the decision of the Court of Session as to those matters. I have since looked through the whole, and I see no reason to depart from the opinion I entertained at that time. I shall, therefore, under these circumstances, humbly recommend to your Lordships, that the judgment of the Court of Session, consisting of these various interlocutors pronounced by the Lord Ordinary, and the interlocutors pronounced by the First Division of the Court of Session, should be affirmed; and, under the circumstances of this case, with your Lordships' permission, I would recommend that they should be affirmed with certain costs.

The House of Lords accordingly ordered and adjudged, that the interlocutors complained of be affirmed, with L. 50 costs.

A. GORDON—A. DOBIE,—Solicitors.

No. 7.

WILLIAM INGLIS, Appellant.—*Spankie*.ANDREW WALKER, Respondent.—*Dundas*.

*Cautioner*.—Where each of A and B, two distressed cautioners, granted to the creditor a bill for one-half of the debt; and each indorsed the bill of the other; and C, interposing as cautioner, put his name as indorser on A's bill, and as joint acceptor on B's; and A retired his bill, but C was obliged to pay B's bill;—Held, (affirming the judgment of the Court of Session), that C was entitled to relief against A.

March 3. 1830.

1st Division.  
Lord Eldin.

HENRY INGLIS and Thomas Aitken were cautioners, to the Commercial Banking Company of Scotland, for the faithful discharge of the duties of James Wilson, the bank agent at Cupar.

Soon after Wilson's appointment, he fell in arrear to the Bank, and the cautioners were called upon for payment. With a view to obtain time to meet this balance, their agent, Mr Kyd, proposed to the Bank a settlement by bills, stating that 'the cautioners would wish each instalment divided into two bills, and Mr Aitken's cautioner and he would accept the one set, and Mr Inglis would be the drawer of that set, and Mr Inglis's set would be reversed. The meaning of this is, that Mr Inglis has got a cautioner for the one-half, and Mr Aitken the other.' The Bank answered, 'We have no objections to take the bills divided and crossed in the manner you propose, provided the names of Mr Aitken and Mr Inglis, and their two friends, be on each bill; that is to say, that all the four gentlemen are to sign each bill, either as drawer, acceptor, or indorser.'

In pursuance of this arrangement, the following notes were granted. 'L. 1373. 2s. 10d. Cupar, 21st December 1815. Against the 11th day of September next we promise, conjunctly and severally, to pay to Mr Thomas Aitken, or his order, at the Commercial Bank's office in Edinburgh, L. 1373. 2s. 10d. sterling. (Signed) Henry Inglis, William Inglis. (Indorsed) Thomas Aitken, Andrew Walker.'

'Cupar, 21st December 1815. L. 1373. 2s. 10d. Against the 11th day of September next we promise, conjunctly and severally, to pay to Mr Henry Inglis, or his order, at the Commercial Banking office in Edinburgh, L. 1373. 2s. 10d. (Signed) Thomas Aitken, Andrew Walker. (Indorsed) Henry Inglis.' The former bill and part of the latter were paid. Henry Inglis and Aitken died. The Bank charged Walker to pay the balance

of the latter bill, and he claimed relief against William Inglis, the brother and representative of Henry. March 2. 1830.

William Inglis resisted, on the ground, that by the two bills the responsibility had been divided, he being cautioner for Henry, and Walker for Aitken; consequently, Henry's bill having been paid, his liability had been extinguished.

The Lord Ordinary decerned against him, with expenses; and the Court, on the 3d May 1827, adhered.\*

Inglis appealed.

*Appellant.*—Cases of the present kind are questions of mere intention. The rule no doubt is, that where (as in the present instance) a secondary cautioner interposes at the desire of the primary cautioners, the secondary cautioner is entitled to total relief from all the primary cautioners. But here there are circumstances which shew, that it was the intention of all the parties under obligation to the Bank, that each of the primary cautioners was to be liable in relief to his individual co-obligant alone. For that purpose the sum was divided into two parts; but the part for which Henry Inglis was primary obligant has been paid. The conduct of parties, and the writings by which the transaction was completed, establish that there was a divided responsibility. Had the case been sent to a jury, the verdict must have been, that the parties intended that the responsibility was to be divided; the appellant to be protected and indemnified by Henry Inglis, and the respondent by Thomas Aitken. This would have been placed beyond all doubt, if Kyd had been examined.

*Respondent.*—The rule of law is fixed and admitted, that where a secondary cautioner interposes at the desire of distressed primary cautioners, they are quoad the secondary cautioners principal obligants, and liable in total relief. It is admitted, that the respondent interposed at the desire of Aitken and Henry Inglis, the distressed cautioners. It is not disputed, that, in consequence, the respondent was liable for the whole amount of both bills to the Bank; and the result must follow, that he has relief against the primary cautioners, or their representatives. There are no traces of any other intention in the circumstances of the case. The form which the obligation was allowed to assume

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\* 5. Shaw and Dunlop, No. 341. p. 726.

March 3. 1890. proves nothing adverse to the respondent's claim. Kyd's testimony never could have been admitted to affect the respondent, who did not employ or authorize him to propose to the Bank any divided responsibility.

**LORD CHANCELLOR.**—In this case, each secondary cautioner was made responsible to the Bank for the whole amount. It lies therefore on the appellant to divide the responsibility as far as relates to the individuals; and it appears to me, that the evidence to prove that is very scanty. The materials seem to me to afford only a conjecture or a guess, and do not establish a distinction between the parties in respect of responsibility. It is said, that if the case had gone before a jury they must have found that distinction. Speaking for myself I would say, that the facts certainly would not have been sufficient, as they are stated in the papers before the House, to lead me to the conclusion that there was ultimately a division of the responsibility: I should have come to the same conclusion that the Court have done. The statement in the report of the case is very short; but I infer from it, that the Court were of opinion that the facts were not sufficient, nor sufficiently established, for the purpose of getting rid of the general liability which the law casts on the primary cautioners. It has been urged, that if Kyd had been examined as a witness he would have proved the case. It is impossible for me to say what his examination would have brought out. Your Lordships must take the case as it stands; and, as it stands, I do not think that there is sufficient evidence to enable your Lordships to come to the conclusion, that the responsibility was divided.—I should, therefore, if your Lordships concur with me in that opinion, move that the judgment be affirmed, without costs.

The House of Lords ordered, that the interlocutors complained of be affirmed.

*Appellants' Authorities.*—3. Ersk. 3. 68; 1. Stair, 17. 30. Mirrie, July 10. 1745, (2125.) Smiton, Nov. 15. 1792, (2138.); and other cases under 'Cautioner,' and Solidum et pro Rata.

*Respondent's Authorities.*—1. Bell, p. 351. Wallace, Feb. 27. 1685, (14,642.) Mirrie, July 10. 1745, (2125.); and other cases under 'Cautioner,' and Solidum et pro Rata.

**RICHARDSON and CONNELL—FRASER,**—Solicitors.

OFFICERS OF STATE for Scotland, Appellants.  
*Lord Advocate Rae—Dundas.*

No. 8.

COMMISSIONERS OF SUPPLY of Wigtonshire.—*James Campbell.\**

*Peer.*—A pauper who was found guilty of theft before the Court of Justiciary, but insane at the time of committing it, having been ordained to be confined in gaol, or delivered to his friends under the usual conditions; and having been sent by the Magistrates of the burgh and the Commissioners of Supply of the county within which the gaol lay, to a lunatic asylum;—Held, (reversing the judgment of the Court of Session), that the Officers of State were not liable for the expense of his maintenance in gaol and the asylum, down to the period when, having recovered sanity, he obtained a remission from the Crown.

JAMES FISHER was born in the parish of Ochiltree, in the county of Ayr. He afterwards acquired, by residence, a settlement either in the parish of Sorn or of St Quivox. He became a wandering pauper lunatic; and, while rambling about Wigtonshire, committed various petty thefts. Being apprehended, he was brought to trial before the Circuit Court of Justiciary held at Ayr; and the jury returned a verdict finding him guilty, but that he was subject to fits of insanity at the time of committing the thefts; and the Court therefore ordered, that he should be transmitted to the 'tolbooth of Wigton, therein to remain during the remaining days 'of his life, unless his friends shall find sufficient security, to the 'satisfaction of the Sheriff of the county, to take the custody 'of his person, and keep him in such security as that he may not 'have it in his power to commit such crimes and irregularities in 'time coming.' He was accordingly transmitted, but the Magistrates of Wigton, and the Commissioners of Supply of the county, finding him a dangerous inmate of the prison, petitioned the Court of Justiciary for permission to remove him to a lunatic asylum; and the Court granted warrant for his transmission to the lunatic asylum of Glasgow or Dumfries—the petitioners to make the necessary arrangement for the lunatic's support with the manager of these institutions; and 'reserving to the petitioners any claim of 'relief they may have for such maintenance against any other 'person or persons.' Fisher was removed to the Glasgow asylum,

March 10. 1830.

2d DIVISION.  
 Lord Pitmilley.

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\* No case was presented by the respondents, nor did they appear by Counsel; but, at the desire of the House, Mr Campbell supported the judgment of the Court of Session.

March 10. 1830. where he remained for some time, until he was restored to comparative sanity, and soon after was set at liberty under a remission from the Crown.

In the mean while the Commissioners of Supply brought an action against the parishes of Ochiltree, Sorn, and St Quivox, concluding for reimbursement of the sums expended on his aliment, and for relief from his future maintenance in the asylum. The Lord Ordinary sustained the defences, 'in respect the libel concludes against the defenders for payment of certain sums of money disbursed by the pursuers, and for relief of certain obligations undertaken by them to the lunatic asylum of Glasgow on account of James Fisher an alleged pauper, in consequence of a sentence of imprisonment for life pronounced against him by the Court of Justiciary, on a verdict finding him guilty of a certain theft, but adding that he was subject to fits of insanity at the time of committing the theft; and in respect there is no rule of law, or any precedent, for subjecting the parish of a poor person's settlement to relieve the party on whom the burden falls of alimentering him in the circumstances and in the manner occurring in this case; and further, in respect the libel concludes against the parishes which are called as defenders, not that these parishes, or one or other of them, shall be decerned in general to aliment the pauper, and that the granting of aliment shall be fixed in the usual manner, but concludes for certain specific sums, viz. for L.35. 5s. 1d. in name of aliment, during a certain named period, for L.18. 13s. 4d. as the expense of legal proceedings, and of removing him to the lunatic asylum, and to relieve the pursuers of the obligations undertaken for his maintenance in the asylum, or otherwise to pay L.50 yearly for the aliment of the pauper during his life.' His Lordship added in a note, 'On the second of the above rationes decidendi, the parties may look into the case of Paton v. Adamson, 20th November 1772, Fac. Coll.' The Court, on petition, adhered; but on a second petition, being equally divided, called in Lord Cringletie, and altered. The parishes now reclaimed; and the Court being again equally divided, called in Lord Pitmilley, and returned to their original judgment, and found the pursuers liable in expenses. The Commissioners of the county again petitioned, and, by a supplemental action, called the Officers of State of Scotland, and the Magistrates of Wigton, who appeared and entered defences. The result was, that the Court adhered to their interlocutor assailing the parishes, with expenses; sustained the defences for the Magistrates of Wigton; but decerned against the Officers of State in terms

of the conclusion for relief as libelled: found no expenses due, but March 10. 1820. recommended to the consideration of the Officers of State the application made by the pursuers for indemnification of the expenses of this action. The case having been again brought under review, it stood over, in consequence of the dependence of another action,\* which it was supposed might rule the decision of the present question; but ultimately the Court (5th June 1827) adhered.†

The Officers of State appealed.

*Appellants.*—The appellants are not liable for the aliment of criminals after conviction. That is a burden which it has been decided falls on the burghs of Scotland. But truly this is not a question as to a criminal. Fisher was not a delinquent at all. From his insanity he could not incur guilt, or be the proper subject of punishment: accordingly, he was not treated or punished as a criminal, but was transmitted to gaol, as being, from his insanity, an unsafe person to be at large. If his friends had been able or willing to keep him, to the satisfaction of the Sheriff, he would have been delivered over to them. No doubt the criminal act brought him before the Court; but, when there, it was proved that his insanity prevented him from having been in the eye of the law guilty of a criminal act. He therefore, whether in gaol, or in the asylum, or free, was a lunatic pauper. But it is a misapplication of terms to say that he was a criminal at all. The sentence pronounced was not in modum pœnæ, but in modum preventionis, as a dangerous lunatic. The Officers of State, therefore, have no concern with him as a criminal, nor is there any authority for holding that they are liable in relief to the Commissioners of the county, because he is a pauper lunatic. They would not, had he never been tried; and his trial does not create any responsibility which they had not incurred before. The enactments in the *Regiam Majestatem* do not impose a liability; and if at any time the Crown has supported pauper lunatics, it only occurred per incuriam. Indeed the point has been settled by the case of Scott, July 9. 1818, F. C. There is clearly nothing in the argument which was stated in the Court below, that Fisher having been imprisoned for public security, the appellants are liable. He would have been equally in confinement for public security, if his

\* *Ramsay v. Officers of State, &c.* March 1. 1825; 3. Shaw and Dunlop, No. 400. p. 597.

† 5. Shaw and Dunlop, No. 359. p. 767.



March 10. 1830. friends had assumed the custody; but would these friends have had a claim against the Officers of the Crown? It is not incumbent on the appellants to say on which party this burden ought to fall. But if principle or authority be consulted, the parishes are liable.

*Respondents.*—The parishes have been finally assoilzied; the defences of the Magistrates have been sustained; and, let the burden light on whom it may, it would be most unjust to enforce it on the respondents. In every view, the Officers of the State are liable. In fact, Fisher was a criminal; and as such was placed in custody. Previous to his apprehension for the thefts he was at large; and there is no ground for saying that he would not have remained so, had he not committed these petty depredations. Besides, if being at large was dangerous to the community, then, in confining him, the public safety has been considered, and the Crown is bound to pay the expense of purchasing that security. Accordingly there are several instances in which the Crown has been at the expense of supporting lunatic paupers in gaol. The authority of the Regiam Majestatem is in accordance with these views.

LORD CHANCELLOR.—After giving every attention to this case, it does appear to me, that there is neither authority nor principle for this decision, and that the judgment should be reversed.

The House of Lords accordingly ordered and adjudged, that the interlocutors complained of be reversed, and the Officers of State assoilzied.

*Appellants' Authorities.*—I. Hume's Com. p. 43.; Regiam Majestatem, 1487, c. 101. Scott v. Thomson, July 9. 1818, (F. C.)

A. MUNDELL, Solicitor.

JANE SMITH, Appellant.—*Lushington*—*James Campbell*.

No. 9.

MARGARET MITCHELL, Respondent.—*Spankie*—*A. McNeill*.

*Proof—Partnership.*—Held, (affirming the judgment of the Court of Session), That private books of accounts, kept by one partner, containing, among other entries, memoranda relative to company affairs—there being no evidence that the books had been seen by the other partner—could not be received as evidence against the representatives of the latter partner.

JOHN MAXWELL and Archibald Smith carried on business in company, as writers, in Glasgow. Maxwell died in 1793, and Smith in 1808. In mutual actions raised at the instance of the representatives against each other, for the balance respectively alleged to be due from the one partner to the other, a question of evidence arose. The firm had not kept regular books of account, and there was no company cash-book indicating what sums had been drawn out by Maxwell; but there were two small books, apparently the private books of Smith, containing memoranda of his personal affairs, and occasional entries relative to company concerns; among others, sundry items of payments made by Smith to Maxwell. If these items were taken into account, the balance would be largely in favour of the representatives of Smith—if they were excluded, the balance would be largely in favour of the representatives of Maxwell.\* There was no evidence that in point of fact these books had been seen or consulted by Maxwell. The Lord Ordinary, Alloway, found, ‘that there was no reason to suspect that these books had not been fairly kept by Smith at his office, and subject to the inspection of Maxwell whenever he chose to look at them; and before answer remitted to an accountant to prepare a report of the state of accounts betwixt the parties, in which he will give such credit to the books in question as he shall consider them entitled to.’ The accountant reported that both books were entitled to credit, and ought to be sustained as evidence; and that a balance of L. 489. 3s. was due, as at Martinmas 1808, to the representatives of Smith. Objections having been made to this report, the Lord

March 10. 1830.

1st DIVISION.  
Lords Alloway  
and Eldin.

\* Before Smith's death, an accountant, founding upon the entries in these books, had reported a balance due to Smith, which, although not actually admitted by Maxwell's representatives, does not seem to have been, for a long while, actively disputed.

March 10. 1830. Ordinary, Eldin, found, that the ' said books ought not to be ' received as evidence in the accounting, and remitted to the ac- ' countant to amend his report accordingly;' and the Court ad- hered, with expenses.\*

Jane Smith appealed.

*Appellant.*—No suspicion whatever attaches to the books in question; and there is every probability that their contents were quite well known to Maxwell. The company entries relative to payments made to him by Smith, are corroborated by various circumstances, and confirmed by the fact, that the representatives of Maxwell for years remained contented with the report of an ac- countant, framed on the principle that these books were legal and sufficient evidence. To strike out these payments, would lead to the untenable conclusion that Maxwell had not drawn money out of the copartnery at all, as there are no traces of any other pay- ments to him.

The respondent's Counsel was stopped.

The House of Lords ordered and adjudged, that the interlocutors complained of be affirmed.

*Respondent's Authority.*—Phillip's Law of Evidence, vol. i. p. 266.

RICHARDSON and CONNELL—D. CALDWELL,—Solicitors.

No. 10. JOHN KIRKPATRICK, Esq. Appellant.—*Spankie—Brown.*

ISOBEL INNES AND JOHN GAVIN, Respondents.—*Lushington.*

*Trust—Title to Pursue.*—A person having conveyed a right in a depending action to trustees and their assignees; and the trustees having died without assigning; and the next of kin (who was interested in the subject of the trust) having confirmed as executor to the trustor; and a creditor of the next of kin having adjudged the right; —Held, (affirming the judgment of the Court of Session), that the creditor had a good title to pursue the action.

\* 5. Shaw and Dunlop, No. 21. p. 32.

IN 1799 Miss Margaret Sime raised an action against John Kirkpatrick, residuary disponee of her brother, who was the disponee and representative of her father, for payment of the amount of her legitim. Pending the proceedings she executed, in 1798 and 1808, two trust-deeds, by which she conveyed to James Clephane and others nominatim, 'or to the acceptors or survivors, 'or acceptor or survivor of them, and to the assignees of them or him, her whole estate and effects, real and personal, and all and singular debts and sums of money, with the grounds, vouchers, and instructions thereof, which have been or shall hereafter be found and adjudged to pertain and belong to me as legitim, or on any other account, or for any cause or consideration, by virtue and in consequence of an action and process now pending at my instance,' &c. in trust, inter alia, to pay over the free proceeds of her estate and effects, personal and real, to the persons, and in the shares following; viz. 'two-third parts of the free residue and proceeds to and in favour of the said James Clephane and Isobel (Innes) his wife, in conjunct fee and liferent, and to their child or children in fee equally among them, or subject to such limitations and distribution among their children, as they or the survivor of them should appoint by any writing under his or her hand; whom failing, to their nearest lawful heirs or assignees whomsoever; and the other one-third part of the said free residue or remainder to Charles Hay, shipmaster in Leith, and to the child or children of his body, either equally among them, or subject to such conditions and distribution as he should appoint; whom failing, to his own nearest lawful heirs or assignees.'

Miss Sime died in 1815, at which time James Clephane was the sole surviving and accepting trustee. In that capacity he entered on the management of the trust, in which he continued till 1824, when he died, without having assigned the trust to any person, and while the action at Miss Sime's instance against Kirkpatrick was still pending.\* Isobel Innes, Clephane's wife, being nearest of

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March 15. 1830.—The Lord Chancellor informed the House, that his Majesty had appointed Lord Tenterden to be Speaker in the absence of the Lord Chancellor, and Lord Wynford to be Speaker in the absence of the Lord Chancellor and the Lord Tenterden.

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\* Several very difficult and involved questions arose out of this action, and were carried to the House of Lords on appeal.—Vide *Sime v. Balfour and others*, March 1. 1804, (App. to Morrison's Dictionary, N. 3. Her. & Mov.); affirmed 20th July 1811, (7. F. C. 684.)

March 17. 1830. kin to Miss Sime, obtained decree-dative, and was confirmed executor. Thereafter she and her only child Isabella Clephane, (wife of Dr Minto), granted a bond for L. 3000 to John Gavin, who thereon raised an action of adjudication and declarator against them, subsuming, that in consequence of Miss Sime's trust not having been given to the trustees' heirs and executors, the trust had come to an end, and that the 'property, heritable and move-  
'able, rights of action, and others thereby conveyed, returned  
'in bonis and in hæreditate jacente of the said Miss Margaret  
'Sime;' and concluding, that he was entitled 'to follow forth and  
'pursue the said action assigned by the said Miss Margaret Sime,  
'deceased, to the said James Clephane, &c. and at the time of the  
'said James Clephane's death depending against the said John  
'Kirkpatrick, Esq. as sole defender, or any other action or actions  
'which may be necessary to enable him, the said John Gavin, pur-  
'suer, to recover the legitim due to the said Miss Margaret Sime,  
'deceased, in consequence of the death of the said John Sime,  
'senior, her father, to the extent of the said Mrs Isobel Innes or  
'Clephane, and the said Mrs Isabella Clephane or Minto's share  
'and interest therein, in order that the said John Gavin, pursuer,  
'may recover payment of the said sum of L. 3000,' &c. The  
Court adjudged and declared in terms of these conclusions.

Isobel Innes and John Gavin having claimed to be sisted as pursuers in Miss Sime's action, Kirkpatrick objected to their title; but the Lord Ordinary repelled the objection, sisted them as pursuers, and the Court (30th May 1826) adhered, with expenses.\*

Kirkpatrick appealed.

*Appellant.*—The titles founded on by the respondents do not confer on them a valid right to insist in the action; because, as the trust conveyed the legal right to the trustees, there remained no right in Miss Sime which could be taken up by the decree and confirmation; and consequently the adjudication in favour of Gavin, which proceeded on the footing that the right had been vested in Isobel Innes, was inept. The only mode in which a proper title could have been obtained was to have raised a process of declarator, calling all the other parties concerned, to have it found, that in consequence of the failure of the trustees, the legal

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\* 4. Shaw and Dunlop, 629.

title to the property should be vested in the pursuers, for the benefit of all concerned; and, in order to accomplish the purposes of the trust, adjudging and transferring the legal title accordingly. The question here is, not whether there be a remedy, but whether the proper remedy has been adopted? And it is clear that it has not. March 17. 1839.

**LORD CHANCELLOR.**—If Mr Clephane had not been expressly appointed a trustee, but was a trustee only in the character of executor, and he had died, on that event would not Miss Sime's representatives have had the right? How can you distinguish between the cases?

*Spankie.*—If Miss Sime had appointed Clephane her executor-nominate, and Clephane had died, the right certainly would have vested in the next of kin. But here the trustee is not a mere executor: he is clothed with particular powers; and the trust-deed clearly shews, that the truster meant to withdraw this right from the next of kin.

**LORD CHANCELLOR.**—What necessity is there for an application by declarator to the Court of Session, in reference to an estate which terminates with life? The testatrix carved out an estate; all the rest remained with her. Why should the Court be called on to interfere where that estate has ceased? Does not the personal representative step in?

*Spankie.*—That is not the view in which the case was argued in the Court below. The law of England might remove the difficulty, by holding that what was not given away remained. But by the law of Scotland there was an absolute transference of the legal estate, though for particular purposes. If the subject had been real, then it is clear that a declaratory action would have been necessary; but the respondents take an unfounded distinction between the cases of real and personal subjects: In the former, they say, that there is no reverting into the estate of the truster; and that in the latter there is. It seems plain, that although the appellant may be a debtor in relation to Sime's estate, he is not to the respondents, in the characters they bear—certainly not to the next of kin; and if not to her, not to John Gavin, who cannot be in a better situation than his author. The appellant has never denied, that there is a proper method by which to call him to account; but the question is, whether the proper method has been adopted? The right is not in bonis defunctæ; it is not in the heir or assignee of the trustee; and there is no clause in this trust-deed, declaring, that if

March 17. 1830. the trustee did not assign, the right should revert to the truster. The question must remain on legal principles; and there are none which give sanction to the respondents' argument. If the appellant admitted this title to pursue, he might be involved in endless litigation. What security would success against the present respondents procure to him? Hay, the disponent to the one-third of Miss Sime's estate, is interested in the execution of this trust; and the question should be treated as if there were twenty other individuals similarly situated. The appellant ought to be made sure that all parties interested are called, and that the decision will not affect the interest of parties not brought before the Court to state their objection to that decision.

LORD CHANCELLOR.—If we once settle who has the legal title, the appellant is secure.

*Spantie*.—That is the difficulty. But we conceive the point is ruled by the case of *Drummond v. M'Kenzie*. The principle which pervades that decision, applies to the case under discussion, and supersedes argument. The passage, taking a distinction between real and personal rights, is unauthorized in principle; and is plainly merely the private and inaccurate opinion of the reporter. But there is also the case of *Campbell v. Campbell*, in which the Court plainly acknowledges the necessity of appointing an administrator, where the trustees fail; and that, where the right had been in them; for, speaking of 'denuding the trustees,' plainly implies that there was something in the trustees to be denuded of. As to any equitable title, it is quite clear, that, without the necessary course of procedure, an equitable title is nothing, independently of the legal title, where the question is, if the party can insist as a pursuer under the circumstances detailed?

*Respondents*.—The trust, not having been granted to the heirs of the trustees, lapsed on the death of the trustees; and the subject of the trust being personal, reverted to Miss Sime, fell in bonis defunctæ, and has been taken up by the next of kin's confirmation. The next of kin acts as trustee for all having interest in the executry, and can be called to account by the parties interested. There is no distinction between a personal trust, not taken to heirs of the trustee, and the office of executor. In both, on failure of the trustee, there is room for the appointment of another to act for the parties concerned. It is a mistake to say that Miss Sime was completely denuded of the legal title in this action. It was no doubt for a time out of her by the trust;

but whenever the trust expired it reverted, and was taken up by her next of kin, Isobel Innes. Had the right been real, there might have been, on feudal principles, a necessity for a declarator and adjudication; but here the right was personal, which Isobel Innes, who was the most materially interested in the subjects conveyed, was entitled, as the party for whose benefit the trust was principally created, to take up, and pursue all personal actions connected with or arising from the trust-deed in her own name, to the extent of her interest. All parties concerned in the trust subjects are protected, for they have a right to call on Miss Sime's personal representative duly and faithfully to administer the trust. As to the case of Campbell, the trustees there refused to act; but they were in existence; and the Court held, that if they all refused to act, an action would lie at the instance of the party interested to compel them to denude in favour of other trustees who would accept. It was necessary to denude them; for, until they were denuded, no other person could act in the trust. But the trustee here is dead, and the person who takes up the right is willing to act. It is quite plain that Gavin's title is good, if that of Isobel Innes be so.

The House of Lords 'ordered and adjudged, that the appeal be dismissed, and the interlocutors complained of affirmed, with L.50 costs.'

**LORD WYNFORD.**—My Lords, Although it is not my intention to address your Lordships at any length, I must ask your Lordships' indulgence to let me speak from the place where I now sit.

Dr Lushington has told your Lordships that you are about to decide on a technical objection; but he admits, that if that objection be founded in law, it ought to be attended to by your Lordships. It has been one of the habits of my life, to look at technical objections with the greatest jealousy, and to get rid of them wherever I could. I was during a considerable part of the argument, particularly during the time that Mr Brown addressed your Lordships, very much afraid that this technical objection would prevail against the justice of this case; but I have satisfied myself that we can get over it, and bring this cause, which has continued as a cause for a period of time that is disgraceful to the judicature of this country, to a speedy, and, I hope, an equitable determination.

My Lords, a Miss Sime, so long ago as the year 1798, executed this deed or will, (it is perfectly immaterial by what name it is called, its construction will be the same), by which she gave all her property to three different persons, namely, James Clephane, William Gavin, and John Young, 'or to the acceptors or survivors of them, and to



March 17. 1830. 'the assignees of them.' My Lords, two of those persons did not accept; Clephane only accepted. By the terms of the instrument, two-third parts of the free residue and proceeds were given to and in favour of Clephane, now deceased, and Isobel Innes, his wife, now also deceased, 'in conjunct fee and liferent, and to their child or children 'in fee, equally among them, or subject to such limitations and 'distribution among their children, as they or the survivor of them 'should appoint, by any writing under his or her hand; whom failing, 'to their nearest lawful heirs or assignees whomsoever.' The remaining third was made over to Charles Hay, ship-builder in Leith, and his issue. After Miss Sime's death, and Clephane's death, Isobel Innes and her daughter, and her daughter's husband, granted a bond for L.3000 to Gavin, for the purpose of being the ground for an adjudication, to enable parties to make effectual their claims under the will.

Now, my Lords, it is admitted in this case, that neither Clephane, the only person who took, and who has since died, nor his wife, made any appointment to affect the present question; and it is for your Lordships to say, whether the Judges of the Court below have decided right with respect of what became of this interest upon the death of Clephane. The Judges in the Court below have decided, that upon the death of Clephane the trust that was in him reverted, as I should say, as bona omitta, to Miss Sime, and through her to her next of kin, and was to be administered by her next of kin. That is the effect of their decision.

My Lords, it is insisted, on the part of the appellant, that this decision is erroneous; because, the trust being at an end, it was necessary for the parties to apply to the equitable jurisdiction of the Court of Session to have a new trustee appointed; for if that had been done, all the parties interested would have been called in, to make their objections as to the disposition of the property. I was, for a considerable time, strongly impressed with the idea, that there was a good deal in that argument, and that that practice not having been resorted to, a decision might be given affecting the interest of parties not brought before the Court to state their objections to that decision; but I submit to your Lordships, that this argument has been satisfactorily answered by Dr Lushington. Dr Lushington says, 'I insist, that this trust expiring with the death of Clephane, the right reverted back to Miss Sime, and passed through her to Miss Sime's personal representative. I admit that Miss Sime's personal representative does not take it in consequence of any beneficial interest she has in it, but that she takes it clothed with a trust; and any party interested would have a right to call upon Miss Sime's personal representative duly and faithfully to administer that trust. Whoever therefore has an interest, has the means of having that interest protected, without calling on the Court of Session to appoint a new trustee.' This an-

swers the claim made for Mr Gavin. The bond was given to him, not by the trustee, but by those who had the beneficial interest. His right must be of the same nature as that of those persons from whom it was derived. The representative of Miss Sime was the trustee of their interests, and must also be the trustee of his: whether the interest belongs to him or them, the trustee is the only person who can support a claim to it in a Court of law. The bond, therefore, that had been given to Gavin, cannot affect the decision. The ground upon which I humbly submit to your Lordships you should affirm the judgment in this case is, that when the right went back to Miss Sime, it passed to her personal representative, and that Mrs Clephane was that personal representative, and as such liable to be called upon, by those who had a beneficial interest, to administer it according to the terms under which she took it. This view of the case appears to me to protect all the parties against any abuse of this trust; and your Lordships may with justice confirm the decision.

But, my Lords, it is for those who insist that the judgment of the Court below was wrong, upon such an objection as they have taken, to shew that the party who sues is not the proper party;—it is for them to satisfy your Lordships, by the authority of decided cases, that the Court below were bound to have decided differently from what they have done, and that your Lordships, in administering Scotch law, are bound to say, that the judgment so given was a judgment inconsistent with the established course of decision in that country. So far, my Lords, from that being the case, only one authority has been referred to that bears upon the point. The case to which I allude is that of Sir Robert Munro of Foulis, in the year 1758; for the Judges in that case took a distinction between real and personal property, and said that in real property the heir must make up his title, and that the heir can make no claim till he has done that: that is stated in distinct terms. If this be correct, a personal representative may proceed at law without making up his title. It is answered, that is but the opinion of the reporter;—but if he be a fair reporter, it is the opinion of the Court. That is a decision as far as it goes against the appellant in the present case. Then it has been insisted that this is a mere obiter dictum. It was not necessary certainly to decide the point; but a case of this kind, unless met by an authority on the other side, is entitled to great consideration, and it is met by no authority.

Mr Serjeant Spankie has referred your Lordships to a case which he considers as overturning this decision, and shewing that it was necessary, that, before the parties could interfere, a confirmation of the character of administrator should be obtained. That is the case of Archibald Campbell, minister at Weem, who had made a deed of mortification, conveying property as it would be termed in this country in mortmain, which he settled on five trustees and their succes-

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March 17. 1830. sors, &c. (His Lordship here stated the case.) Dr Lushington has clearly distinguished that case from the present. The parties did not come and say, in that case, Confirm us as trustees, and we will act in execution of the trust; but they said, that as a quorum of the trustees will not act, the intention of the creator of the trust is therefore destroyed: Give it back to the representative of the family. The Court made this answer, (and it was the only answer they could make), they said—No; suppose all had refused to act, there is not an end of the trust, but we should have denuded them in favour of other trustees. A very ingenious observation has been made upon that expression, ‘we should have denuded them in favour of other trustees;’ namely, that it must have been in them, or it could not have been considered necessary to take it out of them. But observe the distinction—the trustees in that case refusing to act, were in existence. Till they were denuded of their trust, nobody could act upon it. Here the trustee is dead, and there is a person who comes into his shoes, who does not refuse to act, but is willing to act. The Court interfered to denude, because the party would not act; but here, although the trust is gone from the original truster, the person who comes in his room is desirous to act in the character of trustee.

I submit, therefore, to your Lordships, that that authority is not opposed to the decision of the Court below. It is this—There is no doubt that Mrs Clephane and her daughter are beneficially entitled to the property; and the defendant can only say, you shall not recover in this cause, because you have not clothed yourself formally with a character in which you are entitled to sue. We think you have that character. This is consistent with justice. This defendant ought to have handed over the money long ago, and I trust he soon will be compelled to do it. There being therefore nothing to fetter your Lordships’ authority, no established rule to prevent that being done which every body would be disposed to see done, and that as soon as possible,—I submit to your Lordships, that the judgment of the Court below should be affirmed, and with costs.

*Appellant’s Authorities.*—Drummond, June 30. 1758, (16,206.); Campbell, December 11. 1752, (16,203).

*Respondents’ Authorities.*—3. Ersk. Inst. 2. 30. 38.; 3. Stair, Inst. 6. 61. Drummond, June 30. 1758, (16,206).

RICHARDSON and CONNELL—MONCREIFF, WEBSTER and THOMSON,  
Solicitors.

GEORGE BROWN, Appellant.—*Spankie—Brown.*

No. 11.

PATERSON'S TRUSTEES, Respondents.—*Dundas—A. McNeill.*

*Presumption—Payment.*—Held, (affirming the judgment of the Court of Session), that, in the circumstances of the case, two promissory-notes, although found in the possession of the debtor, were to be regarded as renewals of unredeemed bills, and not payments.

*Process.*—An order to consign in the Royal Bank a disputed sum, sustained.

BROWN being indebted to the trust-estate of the deceased Robert Paterson, made several cash payments, and accepted bills drawn on him by, or granted promissory-notes to, Mr Hay, W. S. one of the trustees, and factor for the deceased. An action of accounting having been brought, a question of fact occurred, whether two promissory-notes which were payable by Brown, in his possession, were merely renewals of other bills, or were substantive payments over and above the other bills. A remit to examine into this and other points was made to an accountant, who reported, that although there was no direct or positive evidence of the fact, the inference he drew from the whole evidence before him was, that these two promissory-notes were renewals, and therefore formed no item of credit in Brown's favour.

The Lord Ordinary approved of the report, and found Brown due to Paterson's trustees the sum of L. 562. 19s. 5½d.; but, before issuing decree for payment, ordered parties to be heard on certain claims advanced by Brown for legacies alleged to be due to him out of the deceased's estate. Both parties reclaimed; but the Court (16th January 1827) adhered, with expenses.\* Thereafter the Lord Ordinary appointed Brown to consign in the Royal Bank of Scotland the above sum, with interest on such proportion of the sum as was principal, upon a deposit receipt, payable to such person or persons as should be preferred thereto at the issue of the process. Brown reclaimed to the Court, on the ground, that as his objections had not yet been heard or disposed of, it was incompetent to order consignment; but having allowed the order to consign to become final, and only reclaiming against an interlocutor prorogating the term, the Court (23d February 1828).

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\* 5. Shaw and Dunlop, No. 123. p. 204.

March 25. 1830. refused the reclaiming note, both on the merits and competency.\*

On appeal, the discussion at the bar embraced the state of the accounting between the parties, and the import of the evidence afforded by the *res gestæ* of the case, the appellant strongly relying on the fact of the two promissory-notes in question having been found in his possession.

LORD CHANCELLOR.—The weight of evidence is against the appellant. I would therefore propose to your Lordships, that the interlocutors complained of be affirmed, with L. 50 costs. A cause in this shape ought not to be brought to the bar of this House. It is like a *nisi prius* case.

The House of Lords therefore ordered and adjudged, that the interlocutors complained of be affirmed, with L. 50 costs.

*Appellants's Authorities.*—3. Ersk. Inst. 4, 5.; Ferguson, Nov. 29. 1793, (1488.)

ALEXANDER DOBIE—Solicitor.

No. 12. Honourable WILLIAM MAULE, Appellant.—*Attorney-General—Murray—Brown.*

Major-General Honourable JAMES RAMSAY, Respondent.  
*Lushington—Spankie—A. McNeill.*

*Presumption.*—Circumstances under which a gratuitous bond of annuity, granted by one brother to another, during the joint lives of the parties, found in the custody of a person who was the ordinary agent of the granter, and had also acted as agent for the grantee, was held (affirming the judgment of the Court of Session) to be a delivered deed.

March 25. 1830. THE trust-disponees of the late Alexander Duncan raised an action of multiplepinding, in which they narrated, that they had found among the papers which had been in his possession, in his professional character of writer to the signet, two bonds;—1<sup>st</sup>, A bond of annuity, bearing date the 19th February 1805, granted by Mr Maule of Panmure in favour of his brother-german, Major-General James Ramsay, whereby, for love and affection, and for certain other good causes and considerations, Mr

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Maule bound and obliged himself, his heirs and successors, to make payment to General Ramsay, or his assignees, of an annuity of L.300 sterling yearly, clear of all deductions, and that at two terms in the year, Martinmas and Whitsunday, by equal portions, beginning the first half-year's payment as at the term of Martinmas then last bypast, for the half-year immediately following that term, and so forth half-yearly thereafter, during their joint lives, with penalty and interest:—2dly, A bond bearing date the 14th day of January 1808, granted by Mr Maule to General Ramsay, for an annuity of L.500 in similar terms, the first term of payment being the first Whitsunday for the half-year following; and bearing, that in the event of General Ramsay surviving Mr Maule, by which the above annuity would be no longer payable, then he (Mr Maule) bound and obliged himself, his heirs, executors and successors, to make payment to General Ramsay, and his heirs, executors or assignees, of the sum of L.5000 sterling money at and against the first term of Whitsunday or Martinmas next after his (Mr Maule's) decease, with penalty and interest. The summons farther set forth, that the pursuers had been called upon by General Ramsay to exhibit and produce the said bonds, that they might be given up to him, to be used and disposed of by him as his own proper writs and evidents in all time coming: That the pursuers had reason to believe, that Mr Maule, several years ago, directed Mr Duncan to discontinue the payment of the annuity contained in the bond of the 14th January 1808, on the ground that the bond had remained in the custody of Mr Duncan as the private agent of Mr Maule, and that the same was never delivered, nor meant to have been delivered, to General Ramsay; and payment of the annuity was discontinued accordingly since Martinmas 1819: That the pursuers were desirous to deliver up the two bonds to the person having the best right thereto; and concluding in common form.

Appearance having been made by General Ramsay and Mr Maule, the former stated, that the bonds had been granted to him, and placed for his behoof by Mr Maule in the hands of Mr Duncan, who was the agent of the claimant as well as of Mr Maule; that the annuity was regularly paid by Duncan to the claimant, viz. L.300 half-yearly, from 1805 to 1808, and L.500 half-yearly from 1808 to Martinmas 1819; that the payments were entered in Duncan's books to the credit of the claimant, and to the debit of Mr Maule; that, previously to the granting of any bond, Mr Maule had allowed the claimant L.300 per annum; that he had also granted a bond for L.5000 to another

March 25. 1830: brother, Colonel John Ramsay, which had been permitted to remain in Duncan's hands, and which was conceded by Mr Maule to be a delivered evident; that in the different matters of law business in which the claimant was engaged, Duncan uniformly was his agent—among others, in buying and making up titles to a vote in Forfarshire; that in consequence of some family disagreement, Mr Maule gave orders to Duncan to desist paying the annuity, and that on the claimant requiring from Duncan delivery of the bond, he did not deny that he held it as a delivered evident for the claimant's behoof. The claimant therefore contended that the bond belonged to him, and that he was entitled to delivery and possession of it.

On the other hand, Mr Maule stated, that Duncan was his confidential agent, and was not the agent of General Ramsay; that the General never paid Duncan any business accounts, and even the expense of the vote in Forfarshire was defrayed by Mr Maule himself; that the bond was purely gratuitous, and was executed at a time when Mr Maule was executing a variety of family mortis causa settlements; that he was under no obligation to grant it; and so little, after the lapse of a few years, did he believe that he lay under any legal obligation to pay the annuity, that he had forgot that he had ever executed such a bond, and expressed himself in a letter to Duncan as if no such bond existed; that he never gave instructions to Duncan to hold it for the behoof of General Ramsay, and he never intended that it should be so held; and that when Duncan was applied to by General Ramsay, he did not venture to assert that he held it for him; that when properly considered, the bond for the annuity of L.500, (the only bond under any view now operative), was merely a mortis causa donation; and as to the payments, there was no more necessity of connecting them with the bond, than with the voluntary inclination of Mr Maule independent of all bond; and that the bond to Colonel Ramsay stood altogether in a different situation. From these facts Mr Maule inferred, in point of law, that he had the only good right to the delivery and the possession of the bond.\*

The Lord Ordinary issued the note printed below,† and or-

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\* A great deal of correspondence was produced, but was not explicit, and the material parts are noticed in the speeches of the Judges.

† 'It is an admitted fact, that Mr Maule granted two bonds to his brother, the pursuer; the first dated 19th February 1805, for an annuity of L. 300, during the joint lives of the parties; and the second bond on 14th January 1808, for an annuity of

dered Cases to the Court, who, on the 15th January 1828, found March 25. 1828.

‘ L. 500 during their joint lives; and in the event of his predeceasing the pursuer, for  
 ‘ L. 5000, payable at the first term of Whitsunday or Martinmas after his Mr Maule’s  
 ‘ death. 2d, It is an admitted fact, that prior to the granting each of these bonds, Mr  
 ‘ Duncan, as agent for Mr Maule, paid to the pursuer the annuity expressed in each  
 ‘ of these bonds, before the periods respectively warranted by them for such payment;—  
 ‘ that is, by the first bond, the first half of the annuity of L. 300 was to be payable at  
 ‘ Martinmas 1804, for the half-year immediately following that term; but Mr Dun-  
 ‘ can paid the pursuer, at the term of Martinmas 1804, a whole year’s annuity, instead  
 ‘ of the half allowed by the bond, which was not granted till 19th February 1805. In  
 ‘ the same way, by the second bond, the annuity of L. 500, which came in place  
 ‘ of the other for L. 300, the first term’s payment was at Whitsunday 1806, for the  
 ‘ half-year immediately following: But Mr Duncan paid a half-year’s annuity of  
 ‘ L. 250 to the pursuer at Martinmas 1807. Mr Duncan must therefore have made  
 ‘ these payments, unwarranted by the bonds, by orders of Mr Maule. 3d, It is also  
 ‘ an admitted fact, that Mr Maule granted to his other brother, the Honourable John  
 ‘ Ramsay, a bond dated 18th March 1804, for L. 5000, payable the first term of  
 ‘ Whitsunday or Martinmas after his (Mr Maule’s) death, with the legal interest there-  
 ‘ of from the term of Whitsunday 1804, till the aforesaid term of payment of the prin-  
 ‘ cipal sum. 4th, It is an admitted fact, that these bonds in favours of the pursuer and  
 ‘ his brother John were in the hands of Mr Duncan, who paid the annuities regularly  
 ‘ half-yearly to the pursuer. 5th, It is proved by a letter from Mr Duncan to Mr  
 ‘ Maule, No. 2. of the printed Record, that in answer to a demand from Mr Maule,  
 ‘ for delivery to him of the bond to the pursuer for L. 300, Mr Duncan sent him that  
 ‘ bond: “ Luckily, (said Mr Duncan), however, it is not delivered, and now I enclose  
 ‘ it.” The bond, however, was returned to Mr Duncan, for in his custody it was  
 ‘ found; and as there is no direct evidence why this bond was returned to Mr Duncan,  
 ‘ or why the other for L. 500 was given to him, the question at issue between the par-  
 ‘ ties is, Whether, under all the circumstances of the case, the latter bond must be held  
 ‘ to have been delivered to the pursuer? Mr Maule pleads, and it is an admitted truth,  
 ‘ that Mr Duncan was his agent, and that the bond of annuity of L. 500 was only one of  
 ‘ a number of family settlements executed by him on the same day, all of which were  
 ‘ revocable: That the bond contained an obligation for L. 5000 *mortis causa*, and that  
 ‘ he cannot be considered to have made such a grant to his brother beyond power of  
 ‘ revocation, since that obligation would compete with his onerous creditors. He ar-  
 ‘ gued, that if the bond had been simply a *mortis causa* deed for L. 5000 at his death,  
 ‘ it could not have been held to be a delivered evidenti, and, consequently, that it could  
 ‘ make no difference that it contained an obligation for an annuity of L. 500, because  
 ‘ still the deed remained in the hands of his agent, who he denied was agent for the pur-  
 ‘ suer. He pleaded, that the annuities had not been paid in virtue of the bonds, be-  
 ‘ cause they had been paid before any such bond existed. The Lord Ordinary con-  
 ‘ fesses, that he is not convinced by the arguments for the defender, which were urged  
 ‘ with great force and ingenuity; and such is the construction of his understanding, that  
 ‘ he thinks that the circumstance of the annuities having been paid before the bonds  
 ‘ were granted, is one of the strongest ingredients to demonstrate that Mr Maule in-  
 ‘ tended to put out of his own power to withdraw the annuities. For, if he did not in-  
 ‘ tend the bonds to be obligatory, for what reason were they granted? An order to  
 ‘ Mr Duncan to pay the annuities till Mr Maule should forbid farther payments, was  
 ‘ quite enough. But instead of such revocable order, the bonds were granted, were  
 ‘ put into Mr Duncan’s hands, who acted on them, and regularly paid the annuities.  
 ‘ In particular, the first bond was sent to Mr Maule himself. If it was not to be



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' finding, why did he not keep it? Why send it to Mr Duncan as the warrant for  
' payment of the annuity? It is proved, that when Mr Maule was offended at his two  
' brothers, the pursuer and John, he wrote to Mr Duncan to stop the pursuer's annui-  
' ty, because he had forgotten having granted a bond; and in another letter he wrote,  
' "Colonel John Ramsay may thank his stars that he has a bond." This is evidence to  
' the Lord Ordinary, that Mr Maule considered this bond to have been delivered; for,  
' though it was only so in the self-same way that the pursuer's was, both having been  
' given to Mr Duncan, he decidedly considered the bond to John to have been delivered  
' to him, and acted on, and therefore did not order his annuity to be stopped, although  
' that bond, too, made a mortis causa grant of L. 5000, as well as that of the pursuer.  
' The Lord Ordinary shall suppose that Mr Maule had given a grant of a farm to the  
' pursuer during their joint lives, as a provision to him, and infestment had been taken  
' on it, he thinks that this would have been delivery, though the deeds remained in Mr  
' Duncan's hand; but the regular payments of annuities for eleven years were to the  
' self-same effect—they constituted possession and delivery as much as the infestment  
' would have done.—2. The Lord Ordinary is of opinion, that it is made out by evi-  
' dence that Mr Duncan acted as agent for the pursuer; and although he made no  
' charge against him for payment, this does not remove the character of agent. 1st,  
' He acted as banker or cashier for the pursuer. He regularly drew from Mr Maule  
' payment of the annuities half-yearly, placed them to the pursuer's credit, and paid  
' them to him in portions of L. 100, of L. 50, and on some occasions more or less.  
' 2d, He made out the deeds for a freehold qualification to the General, the expense  
' of which he placed to his debit in account. It is true that Mr Maule generously  
' paid that expense, on which occasion the articles in the pursuer's account were trans-  
' ferred to Mr Maule's; but that is nothing to the purpose in disproving Mr Duncan  
' to have acted as the pursuer's agent. 3d, The pursuer consulted Mr Duncan upon  
' a sale of the freehold qualification which the pursuer held, and would have employed  
' that gentleman to sell it or him, if he had not persuaded the pursuer not to sell it  
' without previously informing Mr Maule of the intended sale; and, meantime, the  
' title-deeds of the qualification remained in Mr Duncan's possession. On all these  
' grounds, the Lord Ordinary has no doubt that Mr Duncan was the agent of the pur-  
' suer, although from friendship, regard, and perhaps gratitude to the family, charged  
' nothing for his trouble; and that, in the whole circumstances of the case, he must be  
' considered to be the depository of the bond of annuity for the pursuer's behoof. Ob-  
' servations were made by the honourable defender on the correspondence of Mr  
' Duncan with Mr Maule and the pursuer, that in some instances it was contradicto-  
' ry, and in general rather sacrificed the interest of the former to the latter. The Lord  
' Ordinary does not think that there is ground for this latter conclusion. For the  
' other there is more reason: Mr Duncan does seem to have made a contradiction, when  
' in one letter he said that the bond was the only warrant for his paying the annuity, and  
' in another, that he had forgotten its existence. But this is of little moment; Mr  
' Duncan was then a very old man retiring from business, and the affair about which  
' he was writing was of so old a date, that even Mr Maule himself, though compara-  
' tively a young man, had himself forgotten it, and therefore Mr Duncan may well be  
' excused for a slight misrecollection of fact. The Lord Ordinary thinks, that the  
' conduct of that gentleman in the whole transaction does honour to his heart as well  
' as his judgment; and the defender will see that the Lord Ordinary's opinion rests on  
' the evidence in the cause, and not on any leaning of Mr Duncan to the one party or  
' to the other.'

‘ of the bond in question ; and, in the whole circumstances of the case, preferred him in the multipoleinding.’\* March 24. 1839.

\* 6. Shaw and Dunlop, No. 114. p. 343.

The following Opinions were laid before the House of Lords :—

*Lord Justice-Clerk.*—This appears to me to be a question rather of fact than of law. If, upon the evidence on the record, it be satisfactorily made out that the bond in question, which is a bond of annuity granted by Mr Maule in favour of his brother General Ramsay, for L. 500 per annum, was placed in the hands of Mr Duncan for behoof of General Ramsay, there does not appear to be much room for doubt with regard to the application of the law. If a bond is granted, and placed by the grantor in the hands of a person who is agent both for himself and the grantee, and has been held in law for behoof of the grantee, it is of no material importance that the agent is also the agent and cashier of the grantor. Lord Stair, alluding to the point, puts the case, that where a bond has been placed in the hands of a party, it is competent to refer to the oath of the depositary, the purpose for which the bond was so placed in his hands. That reference cannot take place here, because the depositary is no longer in existence. But we must endeavour to collect from the letters of Mr Duncan, from the nature of the entries in his books, from his situation in respect to the parties, and from the whole circumstances of this case, what were the purposes, and for whose behoof, the bond was so lodged with him. We sit here as in the jury box, endeavouring to collect from the circumstances of the case, what are the fair presumptions with regard to the matter? our opinion must be made up upon the evidence on the record, and we cannot listen to any averment with regard to other evidence which may remain behind, but which is not before your Lordships. And in considering these circumstances, I differ from the Dean of Faculty in the inference which he has drawn from one part of the arrangement between Mr Maule and Mr Duncan, and the manner in which the payments to General Ramsay took place. It is said, that these payments are not payments made in conformity with the bond, and that that is evident from the circumstance, that the same payment is made before the bond is granted at all; and therefore it is inferred, that these payments are not to be held referable to the bond. I draw a very different inference from this circumstance. I think that the fact, that a payment had been made by Mr Duncan, for General Ramsay's behoof, is a strong circumstance in favour of the subsequent completion of the transaction by the granting of a bond. Mr Maule may naturally have wished to put it even beyond his own power to alter the generous intentions he at that time felt in favour of General Ramsay. Having resolved upon making his brother an allowance, he at first tells his agent to pay to General Ramsay the sum he intended to allow him; but, not content with this, he afterwards wishes to bind himself by a formal bond, and he superadds to the annuity, which was to be payable during the joint lives of the parties, the sum of L. 5000 payable at his death. The first payment had been made without the bond; but when the bond is granted, the subsequent payments are made in conformity with it. If Mr Maule had thought that the verbal order under which the first payment had been made had been sufficient, and had no wish to render the payment of subsequent annuities obligatory upon himself, what necessity was there for directing the bond to be executed at all? Matters might just have been left upon the footing on which they stood, and the payment might have been made half-yearly by Mr Maule's directions without any formal obligation. And therefore it seems to me, that the granting of the bond for the annuity of L. 500 and the principal sum of L. 5000, which is quite without meaning in any other way, becomes quite distinct and intelligible when you keep this in view. A second circumstance in this case, which I think is of material importance, is the evidence

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**Mr Maule appealed.**

*Appellant.*—An unilateral obligation for a sum of money, or an annuity, is not effectual to a grantee, unless delivered;—not

with regard to the delivery of the first bond, which was superseded by the bond for L. 500. I certainly did not understand with the Dean of Faculty, that Mr Fullerton maintained that the first bond was a delivered deed previous to the date of Mr Duncan's letter of the 6th of March; and if that argument had been maintained, I certainly could have given no countenance to it. For unquestionably, at that date, Mr Duncan writes that the bond had not been delivered, and encloses it to Mr Maule. But what I go upon is this, that after the bond is sent to Mr Maule, and his attention expressly called to it by the terms of Mr Duncan's letter, it is again returned by Mr Maule, and is found in the possession of Mr Duncan at his death. That is the circumstance which gives weight to the plea, that the first bond is to be considered as a delivered document, not that it is to be held as delivered at the time when it was discovered and transmitted by Mr Duncan to Mr Maule. Another circumstance to which I look, is Mr Maule's own understanding with regard to delivery. When this misunderstanding unfortunately takes place between himself and his brothers, a good deal of correspondence takes place between him and Mr Duncan with regard to this matter. And I allude the more particularly to Mr Maule's own ideas upon the subject, because I think they go to explain and account for some things which were commented on in the letters of Mr Duncan. Speaking of his brothers, and alluding to Colonel John Ramsay, he says, 'he may thank his stars that he has a bond,' while he evidently forgets that he had granted any bond in favour of General Ramsay. Here then is Mr Maule himself, a gentleman in the vigour of life, totally forgetting the fact of his having granted two bonds in favour of General Ramsay; and if this was possible, it certainly is not surprising that Mr Duncan, a man advanced in years, should have fallen into some mistakes with regard to the matter. But the important point is this, that Mr Maule evidently holds the bond in favour of Colonel John Ramsay to be a deed by which he was effectually bound: And yet that deed had been no farther delivered than the other two; they were all merely placed in the hands of Mr Duncan;—and therefore it does appear to me that the inference follows plainly, that if Mr Maule had recollected that he had granted a similar bond to his brother General Ramsay, he would have considered that bond also as effectual against him. But, in the next place, my Lords, I think that there is evidence that Duncan acted as the agent of General Ramsay. He acted as his agent in making up the freehold qualification granted by Mr Maule to his brother. The account for the expenses in that proceeding was rendered as against General Ramsay, and regularly charged against him. No doubt Mr Maule, acting with a degree of liberality very creditable to him, afterwards directed that account to be charged against himself; but the account was originally charged against General Ramsay as the proper debtor; and I do not see that the character of that agency can be changed by the subsequent transference of the account to Mr Maule's debit. I know very well that it sometimes happens, as the Dean of Faculty insinuated, that in making up freehold qualifications, parties find it to be for their interest to have the account of expenses charged against the person in whose favour the qualification is made up, though the account may be truly paid by another party. I perfectly well understand that, in the case of liferent qualifications, where the objection of nominal and fictitious is apprehended, parties may be very desirous to shew, by producing an account of this nature, that the expense of making up the title was not defrayed by the granter of the vote, though the agent knows very well that he is the real party; and looks to him for payment. But who ever heard of such an objection against a convey-

that the clause of execution should bear that the deed was delivered, (as is necessary in English instruments), but that the deed be

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ance of fee? A gratuitous fee, for the mere purpose of constituting a vote, is altogether out of the question; and therefore, whatever weight might be due to that surmise, if this had been the case of a liferant qualification, I can see no possible motive in the present case for charging the expense of that vote against General Ramsay, except that he was really Mr Duncan's employer. Then observe the nature of the entries in his books. He opens an account in name of General Ramsay; he states half-yearly the payments which he makes him, debiting him with the amount; he answers his drafts and orders, and acts throughout as his agent, banker, or cashier would have done. No doubt it is said he does not make a charge for his agency. Is this so surprising? Is it so uncommon for agents, who have acted perhaps for a lifetime as the men of business of a great family, who have perhaps enriched themselves by their agency, to shew their gratitude by making no charge against a younger brother of that family, a soldier of fortune like General Ramsay? I will venture to say, that fifty instances of such forbearance are in the recollection of your Lordships, and that, even if the business done had been more troublesome than it was—consisting principally of making occasional payments, and transferring these half-yearly from one brother's account to that of the other. Then, is there any thing in Mr Duncan's letters from which we can collect what his understanding was as to this bond? I must say, as to the letter of November 17th, that I cannot draw from it the same unfavourable inference which the Dean of Faculty does. It is argued, that when Mr Duncan says, 'it may be said' that the bond was not delivered, he means it may be said with truth. I do not think that the words warrant that inference. Mr Duncan just states the arguments that probably would be used on both sides, and suggests an intermediate way of arranging the matter. What could be more natural than that he should wish to avoid a collision of this kind between the two brothers? He had been the agent of the family since 1782, and wished to avoid taking any direct part one way or other. But observe, this letter says also, 'when he executed and delivered it to me, he certainly meant it should be obligatory; and accordingly it has been acted upon ever since.' And this shews pretty plainly, that Mr Duncan did not mean to say that it would be said with truth that the bond was never delivered to General Ramsay. Then observe, in his letter of 19th June 1821, he tells Mr Maule, that, if an action for delivery should be brought, he cannot take upon himself to say what would be the result. Is this the language of a man who positively knew that the bond had not been delivered to him for behoof of General Ramsay? If he had known that Mr Maule could say with truth the bond had never been delivered, would he have hesitated about the matter, or thought the issue doubtful? As to the charges which seem to be made against Mr Duncan, of having had an undue bias in favour of General Ramsay, and consulting his interest at the expense of that of his constituent Mr Maule, I cannot see that there is any ground for such allegations; and, whatever may have been his inclination to serve General Ramsay, it is plain that his interest was still stronger in favour of Mr Maule; for there can't be a doubt, that if he had delivered the bond to General Ramsay, he would, in all likelihood, have immediately forfeited Mr Maule's agency. Mr Duncan appears to have been an old man, and his memory somewhat weak, and he might very naturally forget the circumstances connected with the granting of these bonds. But even then his memory is not more defective than that of Mr Maule himself, who, you find, had forgotten even the fact that he had granted the bonds at all. But whenever the circumstances are recalled to his memory, he states the result to Mr Maule, that the bond had been found among the papers, and that this bond had been the authority under which the payments had been made. On the whole, I can draw no other conclusion

March 25. 1830. in fact delivered. In dispositions mortis causa, there is introduced a dispensation with delivery; and purely testamentary deeds are

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from the circumstances of this case, than that the bond had been placed in the hands of Mr Duncan for behoof of General Ramsay, and is to be held a delivered deed.

*Lord Pitmilly.*—This is perhaps a case of nicety; but I am disposed to concur in opinion with your Lordship, that this bond must be held to have been delivered to Mr Duncan as agent of General Ramsay, and for his behoof. We must first attend to the nature of the bond. It is not a mortis causa deed, but a deed of annuity, to be payable during the joint lives of the grantor and the grantee, with a farther payment of L. 5000 after Mr Maule's death. If this conveyance of the L. 5000 had been the only one in the deed, I would have thought this case stood in a far more unfavourable situation. I would have thought it a difficult matter, in such a case, to make out delivery from the circumstance of the bond's being placed in the hands of one who was agent for both parties. But here the annuity is to take effect immediately, and the bond is actually acted upon and payments made; so that this case stands in a totally different situation. In looking at the different presumptions in this case, I must say, I am more strongly impressed by the manner in which the accounts were kept by Mr Duncan, than by his having acted as agent for General Ramsay in other matters. I have looked attentively at these, and I see that these accounts must have been shewn to Mr Maule, and approved of by him; and that he must have seen that Mr Duncan acted in some respects as the agent of General Ramsay. If Mr Maule, after granting the bond, had kept it in his own hands, and had merely given directions to his agent to pay the annuity half-yearly to General Ramsay, the payments made by Mr Duncan, and the entries in his books shewn to Mr Maule, might have been of little importance. But when the bond is delivered out of the grantor's own hand, and the money paid in consequence of the bond by the agent, who retains the bond as his warrant; and these payments go on for such a number of years, the accounts of these payments being exhibited from time to time to Mr Maule,—I do think, without going over a second time the grounds stated by your Lordship, that there is sufficient evidence that this is a delivered deed.

*Lord Alloway.*—I certainly at first felt considerable difficulty in this case; so much so, that I have twice gone over the whole circumstances; but I am now disposed entirely to concur with the opinion delivered from the Chair. I agree with your Lordships generally in the observations made as to both bonds. I don't think there can be any reasonable doubt that the first bond must be held to be a delivered deed, more especially when returned in the way it was by Mr Maule, after his attention had been called to it. And I think there is a great deal in the letter of 8th March 1805, to shew that Mr Duncan thought, even before, that it was a bond to which General Ramsay had right. For he tells Mr Maule, that General Ramsay had called on him for a bond. He says, 'I think he told me, you had bid him call at me for a bond I was to deliver to him; but on searching for the bond I could not find it.' Was this the language of a person who thought General Ramsay had no right to the bond? The only excuse he makes to him is, that he can't find it. If he had found it, it is plain he means to say he would have given it to him. I think the second bond stands very much in the same situation with the first. I conceive the payments made under that bond to be decisive as to the matter. I think this bond must be considered very much of the nature of an ordinary bond, payable by instalments; and that the payment of twelve years' annuities under it renders the presumption of delivery, perhaps, even stronger in this case than as to the first bond. If, then, the bond is placed in the hands of an agent, and payments repeatedly made on that bond for

effectual without delivery, (being always, *de jure*, revocable); but in regard to *inter vivos* unilateral bonds, the rule is absolute. The burden of proving delivery lies on the grantee, especially if the bond be gratuitous: until he prove it, his character of creditor has no existence. But the respondent has not proved delivery. If the fact be as he represents it, proof of delivery, actual or constructive, should not be difficult. It may be ascertained by the examination of the attesting witnesses.

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*Lord Wynford.*—If that be so, and further evidence can be obtained, is there any objection to this case going back to the Court of Session? It is very clear that, if there be means of getting evidence, establishing the purpose for which these bonds were placed in the agent's hands, that ought to be inquired into. We are not in possession of sufficient facts to decide.

*Dr Lushington.*—The appellants are in a mistake. The witnesses to the bonds can give no information. Scotch instruments do not require to bear an attestation that they were delivered.

*Lord Wynford.*—Be it so. But there may be matter otherwise proved which would show the purpose of delivery. I am not impugning the judgment of the Court below. But further information would be desirable for this House. If the case be as it is represented, must not our decision ultimately be, that we have not sufficient facts before us on which to decide.

*Dr Lushington.*—The appellants know perfectly well that there is no other evidence than what is in the cause already. If there were, why did they not avail themselves of it?

*Attorney-General.*—That was no part of our case. The *onus probandi* lay on the respondents.

*Lord Wynford.*—You may proceed with your argument.

*Appellants.*—The bonds never were in the respondent's hands at all. Indeed, he is only now seeking to obtain their possession. They were all along in the appellant's hands; that is, in the hands of Duncan, holding them for the appellant. It is not pretended that Duncan ever received authority to deliver these bonds;

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General Ramsay's behoof, I think the slightest additional presumption will be sufficient to prove the delivery of the deed. And that presumption I find in the fact, that the agent was the agent of both parties. I concur with what your Lordship stated as to the freehold qualification; and I am still farther influenced, by what I see of the mode in which these books of Mr Duncan were kept. On the whole, I think there is sufficient evidence that the bond in question is a delivered deed.

*Lord Glenlee* concurred, without delivering any opinion.

March 25. 1830. and the evidence clearly shows, that, at all events, Duncan was unable to say that he held them as agent for the respondent. But where a deed is in the hands of the granter's private agent, who is also agent for the grantee, there will not be held to be delivery for the grantee's behoof, unless the holder can say that such was the avowed purpose of the deed being placed and allowed to remain in his (the holder's) hands. Without such evidence, the presumption of law is, that the holder holds for the granter. If the rule were otherwise, all confidence would be destroyed, and the express intention of parties defeated. The passage cited by the respondent from Erskine's Institutes (3. 2. 43.) can only be held to import, that a deed put by the granter into the possession of one who is the doer both for the granter and grantee, is presumed to have been given to that person for behoof of the grantee, where such a presumption is warranted by the facts of the case. Unless such a qualification be admitted, no person could make an agent a holder of a deed, without the danger of consequences ensuing the very reverse of what the granter intended.

At all events, both bonds are not due: but under the judgment of the Court below, the respondent's claim to both is sustained.

*Respondent.*—This is, in point of law, a very plain and simple case. Even if the facts were not, as they are, sufficient to show the distinct intention of the custody being for the respondent's behoof, the principle has long been settled, that where a deed is delivered to a person who is agent both for donor and donee, the presumption is that he holds for the donee. From this presumption, no doubt, the donor can relieve himself by evidence, if the fact be contrary. But that evidence must be adduced by the donor, and cannot be thrown on the donee. In this case, the appellant has totally failed in proving that Duncan held solely for him. On the contrary, the appellant himself has proved, that every probability exists for drawing the conclusion, that the custody was given to Duncan for the behoof of the respondent.

The House of Lords declared, that the respondent is entitled to delivery of the bonds, dated respectively the 19th of February 1805 and the 14th January 1808, in the pleadings mentioned; but that, in consequence of the execution and delivery of the said bond dated the 14th of January 1808, the obligations of the said bond of the 19th of February 1805 ceased and became void.

‘ And with this declaration it is ordered and adjudged, that the in- March 25. 1830.  
 ‘ terlocutors complained of be affirmed.’

LORD WYNFORD.—My Lords, This is what is called in the Scotch law a proceeding by multiplepoinding, which is analogous to a proceeding that is very familiar to us in this country in a court of equity, namely, a bill of interpleader. My Lords, the nature of this remedy is this:—A party is in possession of two bonds: the party, in whose possession they are, disclaims any right to the bonds himself, but he says there are two parties who claim these bonds: If I deliver them to A, I shall be in danger of a suit by B; and if I deliver them to B, I shall be in equal peril of a suit at the instance of A. I therefore come to the Court, and I desire the Court to relieve me from this difficulty, by telling me to whom these bonds are to be delivered. Your Lordships are therefore called upon to say, whether the Court of Session in Scotland has done right in directing that both these bonds should be given up to Major-General Ramsay, in order that he might put them in full suit against his brother Mr Maule. It appears to me, my Lords, that two questions will arise in this case; first, whether these bonds were ever completely executed, so as to render them obligatory on the party giving them; and, in the next place, whether any thing has occurred which has destroyed the validity of one of these bonds. Now, my Lords, one of the learned Counsel at the Bar has been very severe on the other side, for confounding the Scotch and English law. I am afraid I must bear the severity of that attack, and I do it with perfect good-humour. Undoubtedly I was misled by the difference that exists between the attestation of an English and a Scotch deed. In England, the attesting witness not only declares that he has seen the instrument signed and sealed, but he attests that he has seen it delivered; for the form of the attestation is ‘ signed, sealed, and delivered in the presence of us.’ If ever the validity of that deed comes into dispute, the witnesses would not only be ready to prove the signing and sealing, but they would be required further to prove the delivery; as, in the case of a will, they are required to prove not merely the signing, but they are required to prove that the party published that as his last will. Now, my Lords, according to the law of Scotland, certainly the witnesses do not, by the formal act, attest the delivery; and therefore it is most probable, that what has been stated is correct, that the instant the witness has seen the instrument executed he retires,—he is *functus officio*,—he has done his duty, and may not hear any thing of the delivery of the instrument, or what is to be done with it; and perhaps this may account for the circumstance of the witnesses I have alluded to in the course of the argument not having been called. My Lords, I mentioned that the question relates to two bonds. The first, my Lords, is a bond, of the date of the 19th of February 1805, in which Mr. Maule, who is the



March 25. 1830. executing party to that bond, says, 'I do hereby, for the love and affection I bear to the Honourable James Ramsay, my brother-german, and for certain other good causes and considerations, bind and oblige myself, my heirs and successors, to make payment to the said James Ramsay or his assignees, of all and whole an annuity of L. 300 sterling yearly, clear of all deductions, and that at two terms in the year, Martinmas and Whitsunday, by equal portions, beginning the first half-yearly payment as at the term of Martinmas now last bypast, for the half-year immediately following that term, and so forth half-yearly thereafter during the joint lives of the said James Ramsay and me.' That is a part of this instrument which is extremely material, because it appears to me to answer a very ingenious argument that has been addressed to your Lordships by his Majesty's Attorney-General. My Lords, if this bond had been binding on the representatives of the obligor, the observation that was made by his Majesty's Attorney-General might have accounted why this bond was to be kept in the hands of Mr Maule's agent during Mr Maule's life; namely, it might have been inconvenient that it should have its full force and operation till the period of his death, and that the intention of the parties was, that it should (for this is the argument of the Attorney-General) come into full effect at the death of Mr Maule, and not till then. Now, it happens unfortunately for that argument, that it cannot come into effect at that time; for, at the death of either of the parties, the validity of that instrument is entirely gone. Now I advert, my Lords, to this circumstance, because, if the Attorney-General found it necessary to account for the making of these bonds, it must have occurred to a man of his understanding, that such an instrument, to be rendered perfect, must be rendered perfect immediately, unless some reason is given to show why it is not to operate as a perfect instrument, and not to have full effect till a future period; but the reason which he has given, from the circumstance I have stated, I humbly submit to your Lordships fails altogether. My Lords, as no reason has been given then, why, when this bond was made, it was not to take instant effect, what effect is it that your Lordships are to say it is to have, but an immediate effect? If I could see, either on the face of the instrument, or from the situation or conduct of the parties, that it was to take effect at a future time, I should humbly advise your Lordships to attend to those circumstances; but I can see nothing on the face of the instrument, and no circumstance (to use an expression which is familiar to us in this part of the island) dehors the bond—out of the bond—that has been proved, which shews that it was to take effect at any other time than at its immediate execution. One circumstance has been stated, as furnishing an argument that it was not to be immediately effective, and which I shall feel it my duty to mention after I have called your Lordships' attention to the second bond that is produced in this case, namely, that it

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was not delivered to General Ramsay. This other bond is of the date of the 14th of January 1808. The difference, my Lords, between the bond of 1808 and that of 1805 is, that the bond of 1808 secures to Mr Ramsay an annuity of L.500, and, as I mentioned to your Lordships, the previous bond secures an annuity of only L.300. The last bond is for the joint lives of the parties, and also, in the event of General Ramsay outliving his brother, for securing the payment of a principal sum of L.5000. My Lords, I will not repeat to your Lordships the observations I have made upon the other instrument, (as far as they are applicable to it), farther than to say, that this instrument upon the face of it appears to be an instrument calculated to produce an immediate effect. My Lords, I think the object is very apparent, and I think the Court of Session below took the ground which, I should humbly submit to your Lordships, was the proper one on which to decide this case. My Lords, it appears that Mr Maule, (who, it has been stated at the bar, was in possession of a large fortune), thought proper to make an allowance for a younger brother of his, General Ramsay. It was at first a voluntary allowance, and subject for its continuance to his Mr Maule's pleasure, in order to support Mr Ramsay in a manner suitable to his rank in life. In what followed, I am only giving credit to Mr Maule when I state, I believe his object to have been this, to place his brother in a situation in which they could meet, though not on terms of equal affluence, at least on terms of equal independence; that he should not be looking up to him from day to day for the provision which he should receive from Mr Maule, but he was disposed that what originally depended on the continuance of his kind feeling towards his brother should be converted into a legal obligation. I am persuaded that was the intention of this gentleman; and I think the question now is, Whether it is not for your Lordships to effectuate that intention? Before we settle the law, it is necessary to ascertain with accuracy the facts of this case. It appears that both the bonds were left in the hands of a Mr Duncan. Mr Duncan was undoubtedly (to use the Scotch expression) the doer of Mr Maule. It will be material, undoubtedly, to ascertain whether, as well as being the doer of Mr Maule, he was not also the doer of Mr Ramsay. Now, my Lords, the ground upon which Mr Ramsay puts his case, in what is called the condescendence in the Scotch Court, is shortly this, and therefore it is material to attend to it—for that is the ground upon which the case is rested by the pleadings, and that is the ground upon which it was decided by the Judges—in his condescendence he puts it upon these two grounds:—First, These bonds were placed in the hands of the late Alexander Duncan, (that is, the bond for the L.300 and L.500), writer to the signet, who was the agent of the claimant as well as the Hon. William Maule: Secondly, Subsequently to the execution of these bonds, 'Mr Duncan regularly paid the claimant the said annuity, or gave him credit for it in his accounts.'

March 25. 1830. It is upon that case he rests. Now, my Lords, let us see whether these propositions are made out; for I should state to your Lordships, that it was upon the ground of these propositions being made out, that the interlocutor, as it is called, was pronounced by the first Judge to whom this case was submitted, and afterwards confirmed by the decision of the whole Court. Now, was Mr Duncan the agent of both these parties? What is necessary to constitute an agency? A man may be agent for another, and yet receive nothing for his agency. We often hear of agency without payment, and of persons being made responsible for the acts of their agents, to a tremendous extent, to whom they pay nothing for their services. If he was acting from motives of affection and regard, or of gratitude to a family with whom he had been long connected, I think that constituted an agency. Now, is not that this case? Probably Mr Duncan never was paid one single farthing by Mr Ramsay: I do not think it is very likely he ever was; but Mr Duncan was engaged for Mr Maule, who is stated to have been in possession of a very large fortune, and therefore was no doubt an exceedingly good client to Mr Duncan; and Mr Maule being so good a client to Mr Duncan, is it a very extraordinary thing that, being paid exceedingly well, perhaps overpaid, by an elder brother, he should condescend to render a small service, (for the state of Mr Ramsay's circumstances were such as not to require any very onerous service);—is it an unusual thing, that, when a man is well paid by one brother, that he should render a service to another? Now, my Lords, that does appear to me to be precisely the situation in which Mr Duncan stood. Mr Duncan does take upon himself, beyond all doubt, (the whole of the accounts shew it), to pay the annuity, receiving the money from the estate of Mr Maule. He pays it over from time to time to Mr Ramsay; and Mr Ramsay also, as he had occasion, gave orders to persons to whom he was indebted upon Mr Duncan, who paid according to those orders. Antecedent to the execution of these bonds, Mr Duncan had placed himself, in my opinion, in the situation of an agent for Mr Maule; and that, as agent for Mr Maule, there is no doubt he placed himself—by undertaking to do the sort of business he appears to have done from the beginning to the end of the account—he placed himself in the situation of agent for Mr Ramsay also. Now, my Lords, if he was agent for Mr Ramsay, then that brings us to the point. What effect has the delivery of a bond of this sort, by committing it to the custody of an agent for both parties? In the Institutes of Mr Erskine, to which we are constantly referred, we have a long paragraph, which, to my mind, most satisfactorily and clearly explains the law upon this subject. Mr Erskine says,—‘A writing, while it is in the granter's own custody, is not ‘obligatory.’ The law of Scotland and the law of England are the same upon that subject. If I were to seal a bond to one of your Lordships, and keep it in my own hands, the very act of keeping it in my own hands shows that I do not mean immediately to put myself

in your Lordship's power. 'For, as long as it is in his own power,' March 25. 1830.  
 continues Mr Erskine, 'he cannot be said to have come to a final resolution of obliging himself by it. And because one may hold the custody of his writings either by himself or his doer, a deed which appears in the hands of the granter's doer, has as little force against him as if he had retained the custody of it by himself.' So, my Lords, if this bond had been given to Mr Duncan merely as the doer of Mr Maule, it would have been the same as if he had kept it in his own strong-box. But I have stated to your Lordships my reason for thinking that, when he delivered it to the agent Mr Duncan, it was not in his hands as his own doer, but as the doer of Mr Ramsay also. Then we get to a gratuitous writing:—'Thus a gratuitous writing, where it was found in the custody of one who was a stranger both to the granter and grantee, was presumed to have been deposited with him under the tacit condition that it should be returned to the granter if he called for it during his life;' that is, when it is in the hands of a perfect stranger. 'But,' Erskine continues, 'Lord Stair, without distinguishing between onerous and gratuitous deeds, affirms, that all deeds in the hands of a third person are presumed to have been delivered by the granter absolutely for the grantee's behoof.' Now, my Lords, upon that there is great dispute; and I shall not trouble your Lordships with any observations inviting your Lordships to the reconciliation of this dispute, because I think this is not that case, for the reasons I have already mentioned. My Lords, we now come to the precise case in question: 'Unless it shall be proved by the writing or oath of the grantee, that they were deposited in that person's hand under certain limitations or conditions. Accordingly, a deed put by the granter into the possession of one who was *doer both for the granter and grantee, was presumed to have been given to that person for the behoof of the grantee.*'\* Now I have stated to your Lordships, that that appears to me to be precisely this case. In this case, the instrument is given to Mr Duncan, who is the doer both of the granter and grantee. If it is according to the law of Scotland (which has been acted upon by the judgment that your Lordships are now called upon to reverse), that the deed is to be presumed to have been given to that person for the behoof of the grantee, this judgment is undoubtedly right. It will be, therefore; for your Lordships to consider, whether that law is impugned by any decision. I have heard no decision cited at your Lordships' bar, (though this case has been argued with uncommon industry and ability), which has the slightest tendency to shake the authority of the passage I have read to your Lordships. Several cases have been mentioned, but your Lordships will find that no one of these cases touch upon this point. I will mention, first, the last case which has been referred to, of Ogilvy and Lord Balmerino, which appears to me to have nothing to do with the present question.

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\* The passage in italics underscored by his Lordship.

March 25. 1830. That case was decided upon the bona or mala fides of the transaction, and had nothing whatever to do with the character of the person in whose custody the deed was. My Lords, other cases have, however, been mentioned to your Lordships;—one was the case of *Helen Hume v. Lord Justice-Clerk*, 28th June 1671, (*Morison's Dictionary of Decisions*, p. 5688. voce 'Homologation.' But all that was decided in that case was, that the payment of an annualrent did not import a homologation of a bond given by an instrument which was absolutely void, and therefore not capable of being set up by homologation. This case does not bear upon the point now under inquiry. Your Lordships are not now inquiring whether there was a homologation, which is a confirmation; but you are inquiring whether these bonds were executed. The case of *Lady Cumming* has also been mentioned. That was a case in which a Captain Wedderburn, being about to marry a second wife, gave a bond to his daughter, (who afterwards became Lady Cumming), as a maintenance for her. The question was raised, whether the delivery of that bond to Lady Cumming's father's uncle, was such a delivery as would give validity to the bond? Had the case been decided on that point only, it would have been most important to our present inquiry. Now, it is material in deciding on a case, to look at what the spirit of the decision was, and what the circumstances under which it was pronounced. My Lords, the first thing that strikes one in looking at this case is, that the person that came to set aside that bond was Mr Holwell, a creditor of Captain Wedderburn's,—and he came upon a ground that was unanswerable, namely, that 'Captain Wedderburn, being insolvent, had given a bond, for the benefit of his family, to his (the creditor's) pre-judice.' Your Lordships have heard, that, by the law of Scotland as well as by the law of England, a party cannot provide for his family at the expense of his creditors; and that a deed upon a consideration of love and affection, cannot prevail against creditors. It is true that he also insisted, that the delivery was not sufficient to give effect to this bond. It appears from the report, that although some of the Judges thought the whole circumstances of the case afforded evidence that the bond was delivered for behoof of the defender, (that is, the lady), a great majority were of opinion that the action was well founded; and the reporter says, that their decision rested chiefly upon the general presumption pleaded. The majority, therefore, certainly decided upon a ground that is inconsistent with the judgment of the Court of Session in the present case for the pursuer. But when several considerations were operating upon the minds of the Judges, and when, undoubtedly, one of the considerations was abundantly sufficient to justify the judgment,—and your Lordships have only the authority of the reporter that they mainly relied upon the other,—can your Lordships consider a decision as entitled to much consideration in the present case, when that principle, which I think is the only one upon which they were warranted in coming to the decision, has nothing to

do with this case? It seems to me, therefore, my Lords, that the law laid down by Mr Erskine, and supported by Lord Stair, cannot be disputed. If it cannot, I think the Lords of Session in Scotland were warranted in coming to the conclusion, that this gentleman was the agent of both the brothers, and that a delivery to him was a delivery to Mr Ramsay. Then, unquestionably, both these bonds came into operation immediately upon their execution. March 25. 1830.

I therefore humbly submit to your Lordships, that both the L.300 bond and the L.500 bond took effect from the time of their execution; and that the judgment of the Court below, as far as relates to that part of the case, should be supported. But, my Lords, the attention of the Court below does not appear to have been called to the circumstance, that the L.300 bond had existence at the time the L.500 bond was given; and your Lordships have been asked this question, 'Do your Lordships think that it was the intention of this party to pay L.800?' If the Court below had been asked that question, I think they would have started back, and said, 'No; we cannot suppose it was his intention to pay L.800;'—they would have said, 'We think the giving the L.500 bond was in satisfaction of the L.300 bond; it was only intended to raise the bounty from L.300 a-year up to L.500 a-year, and not to add the five and make it an additional sum to the three.' That is what strikes me; and I am confirmed in this circumstance, because, looking through these accounts, I cannot find that ever more than L.500 a-year was paid. Now, my Lords, if the understanding of the parties was, that, after the year 1808, L.800 was to be paid, your Lordships would have found the accounts running on in that way; but, instead of that, there are two half-yearly payments of L.250, making L.500 a-year; which clearly shews that it was the understanding of the parties, that the L.500 was to be in satisfaction of the L.300, and that the two bonds were not to be enforced. This occurs to me, my Lords, to be the justice of this case; and that you are warranted in coming to that conclusion, as well on the circumstances under which the bonds were given, as upon what appears in the accounts. If that be so, the humble motion I have to make to your Lordships is, to declare that the respondent is entitled to the delivery of the two bonds. Perhaps, my Lords, I ought to explain this. One of the bonds is not desired to be delivered up, and, therefore, it might be either a declaration that the respondent is entitled to the delivery of the two bonds mentioned in the pleadings, or that, (which is the necessary consequence), upon the delivery up of the bond of the 14th of January 1808, the obligation of the bond of the 19th of February 1805 ceased; so that, though it leaves the bond in the hands of the party, it will put an end to its effect; and, with this declaration, dismiss the appeal, and confirm the interlocutor.

There is then, if your Lordships agree with this motion, only one other point for consideration, and that is the costs. Now, I am disposed to advise your Lordships not to give the costs, because it

March 25. 1830. appears to me that the appellant was driven to come here. If the parties had given up the bond for the L.300, and had come here merely to claim the L.500, I think they would have been entitled to costs; but an appeal was absolutely necessary for the purpose of getting rid of the L.300 bond. I therefore humbly submit to your Lordships there should be no costs; and, with your Lordships' permission, I would humbly make that motion.

*Dr Lushington.*—Your Lordship will allow me to say, that General Ramsay never claimed the L.300 bond. We have admitted, on the face of the record, that that bond was extinguished.

LORD WYNFORD.—If I have been understood as saying, that General Ramsay has been making a claim which he ought not, I beg to observe, nothing of that sort entered into my mind; and if any one word has fallen from me in the course of what I have said, which may convey that idea, I am sorry for it.

*Appellants' Authorities.*—3. Ersk. 2. 43.; 1. Stair, 13. 4. Hume, June 28. 1671, (5688.) Ogilvie, June 14. 1699. Irving, Nov. 1738, (11,576.) Holwell, May 31. 1796, (11,583.) 2. Fount. 51.

MONCREIFF, WEBSTER and THOMSON—RICHARDSON and CONNELL,—  
Solicitors.

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MAGISTRATES OF EDINBURGH, and PATRICK SANDEMAN, Appellants.—*Sir Charles Wetherell—Lushington—Simpson.*

No. 13. ALEXANDER M'FARLANE, and WILLIAM BRUCE and OTHERS,  
Respondents.—*Spankie—Brown.*

*Ferry—Harbour—Statute* 28. Geo. III. c. 58.—Held, (affirming the judgment of the Court of Session), that Steam boats, carrying only passengers and their baggage, fall within the description of "Ferry boats or Passage boats," in the above statute and relative tables regulating the dues exigible at Leith and the adjacent bounds, and are liable only to pay rates as such.

March 30. 1830.

2D DIVISION.  
Lord Mackenzie.

THE Magistrates of Edinburgh are, by a variety of ancient charters, empowered to exact certain dues from vessels frequenting the ports, stations, and harbours of Leith and Newhaven, on the Firth of Forth, within certain bounds. The material clauses will be found in the foot-note.\*

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\* Totum et integrum predictum portum estuarium et receptaculum, vulgo the port hevin and berbrie de Leith, et fundum ejusdem, ac radam et stationem de Leith et pertinen. cum omnibus et singulis propugnaculis, vulgo the peiris, shoris, and bulwarkis ejusdem, ac cum omnibus viis plateis, callibus, diverticulis, tramitibus, et passagiis, ad

In particular, by 'the golden charter' granted by James VI. March 30. 1580. in 1603, (besides confirming the previous grants), there were conferred on the Magistrates 'all the privileges, customs, harbour, 'dock, and shore dues, anchorage, golden pennies, exactions, rents, 'duties, and casualties of the said port, haven, road, and towns of 'Leith and Newhaven, according to the following table, clauses, 'conditions, and privileges therein contained.' The table specifies a variety of goods, upon which certain duties are to be exacted from freemen and unfreemen; and it contains this clause: 'For every 'dreg boat and small cock boat, four pennies; each ferry boat in- 'ward four pennies, and outward four pennies; and for keeping 'good order in their several stations, twelve pennies.'

In the charters, the words are 'ilk ferrie boitt.' In tables issued by the Magistrates from time to time for the use of the collector of the dues, the expression is sometimes, 'all ferry boats;' at others, 'all passage or ferry boats;' and again it is declared, that 'all passage boats, ferry boats, and pinnaces, shall pay of 'beaconage and anchorage, each time they come into the harbour, 'two shillings Scotch; but if they bring goods, &c. they shall pay 'as other vessels according to the tonnage.'

In 1788 a statute (28. Geo. III. c. 58.) was passed, proceeding inter alia on the preamble of the great utility of ascertaining the fees and other dues now payable, and hereafter to be paid, by the owners of ships and vessels resorting to the said harbour, basin, quays, piers and docks, and by merchants and other traders using the said warehouses; and by which it is provided, that whereas 'there are 'payable to the Lord Provost, Magistrates and Council, on behalf 'of the community, in name of beaconage and anchorage, for all

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'et a dicta villa ducentibus ex utraque lateribus dicti portus et aque de Leith quous-  
'que advenerint contigue ad menia seu muros domorum et tenementorum super utraque  
'lateræ dicti portus edificat. Ac cum omnibus commoditatibus, assiamen-  
'et immunitatibus ad præmissa spectan. ac pertinen. Et in specie omnia et singula  
'privilegia, custumas et alia prout ad longum in vulgari sequitur, viz. and in special all  
'and hail the privilegia, custumes, hevynsilver, anchorageis, docksilver, goldyn penneis,  
'echoirsilver, exactionis, rentis, dewteis, and casualiteis of the said poirt and hevyn of  
'Leith, raid thiarof, and Town of Leith and of the Newhevin; 'necon totum et  
'integrum antedictum novum portum nuncupatum the bevin and harbrie of Newhaven  
'ac stationem, et radam ejusdem, cum terris cuniculariis vulgo lie lynkis, domibus, edi-  
'ficiis, terris, et bondis, et suis pertinentiis, jacen super littus maris ex australi latere aqua  
'de Forth a capella Sancti Nicolai ex boreali latere ville de Leyth usque ad terras  
'nuncupatas Weirbybrow,'—'cum omnibus et singulis privilegiis portuum, pecuniis  
'anchorageis, lie docksilver, golden penneis, impositionibus, custumis devoris, taxationi-  
'bus, exactionibus, census firmis et casualitatibus ad dictum portum annexatis; ac  
'cum viis plateis, passagiis, a et ad dictum novum portum ducentibus modo et cum  
'privilegiis supra specificatis.'



March 30. 1830. 'drag boats, fish boats, or yawls, each time they come in with  
' fish or oysters, the fish boat threepence, and yawl twopence, both  
' sterling; for every passage boat, ferry boat, or pinnace, twopence  
' sterling; and for all vessels, whether ships, barks, or boats, (other  
' than drag boats, fish boats, yawls, ferry boats, and pinnaces be-  
' fore specified), one penny halfpenny sterling for each ton of  
' their burden; and which fees for beaconage and anchorage, the  
' said Lord Provost, Magistrates and Council, and their successors  
' in office, are hereby authorized by authority foresaid to exact,  
' levy, and demand.'

For a great length of time, passengers were conveyed across the Firth of Forth in sailing boats and pinnaces, plying between Leith and Kinghorn; and it was alleged, that although these boats and pinnaces, when so engaged, paid the stipulated twopence, yet, if they plied to and from other ports, they ceased to be considered as ferry boats, and were charged the penny halfpenny for each ton. Recently, in consequence of the application of the power of steam to purposes of navigation, private individuals established steam passage boats on the Firth of Forth, traversing it in various directions, and conveying passengers and their luggage to and from Leith and Newhaven, to Alloa, Grangemouth, Stirling, and other places. Bruce, M'Farlane, and others, the owners of these boats, by permission of the Magistrates of Edinburgh, built for their own convenience a chain pier near Newhaven, by which passengers embarked or landed.

These steam boats had plied for several years without being called upon to pay any dues; but recently Bruce and others were required by the collector to pay arrears at the rate of one penny halfpenny on each ton, in respect that these steam boats were not passage or ferry boats of the description, or engaged in the employment, which fell under the class liable only in the payment of twopence for each trip. To enforce this claim he raised an action against them in the Admiralty Court, and decree being pronounced against them, the question was carried to the Supreme Court by suspension and reduction. Macfarlane and others then raised an action of declarator against the Magistrates and Collector, concluding, *inter alia*, that it should be declared that steam boats used in the transport and conveyance of passengers only, and their luggage, are to be held and considered as passage boats or ferry boats merely, and as such are only liable for, and ought to be rated at the same fees or dues, as are payable for and exigible from other passage boats or ferry boats entering the harbour of Leith, and landing passengers thereat. In the

reduction and suspension and declarator, the Lord Ordinary March 30. 1890. found, 'that vessels ordinarily employed in moving, whether by 'steam or otherwise, between any port or ports in the Firth of 'Forth, and the ports of Leith or Newhaven, solely for the conveyance of passengers and their ordinary luggage, and not for 'the conveyance of goods, may more reasonably be considered, in 'reference to harbour dues, as passage boats liable to pay a certain 'sum for each trip, than as other vessels liable to pay dues in 'proportion to tonnage;' but found, on the other hand, that such 'vessels must pay dues as passage boats, whether they enter the 'said harbour of Leith or Newhaven, or land the passengers within the limit of the harbour by means of small boats.' To this judgment the Court (16th May 1827) adhered.\*

The Magistrates and Collector appealed.

*Appellants.*—There has been for centuries a great public ferry from Leith and Newhaven directly across the Firth of Forth, on which ferry the boats included and contemplated by the statutes and the tables, regularly plied. But the steam boats are in a very different situation. They are not ferry boats; and the phrase 'passage boat,' being synonymous with 'ferry boat,' the steam boats can be regarded in no other light than other vessels liable to the rates per ton. It would be perverting the construction of the statutes, and giving the owners of these modern inventions an unjust preference, to support the interpretation sanctioned by the judgment of the Court of Session.

*Lord Chancellor.*—If there are other boats than ferry boats, and the words of the statute are so comprehensive as to embrace the other boats, why limit the meaning of the word? If originally there had been no boats plying but mere ferry boats on this line, but if other boats commence plying on different lines, why are you to exclude the latter?

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\* 5. Shaw and Dunlop, Nos. 665-8. The steam boats did not enter into either the harbour of Leith or Newhaven, but received and landed their passengers at first by boats and planks, and afterwards at a chain pier, built by the owners of the steam boats near Newhaven, on a feu from a private individual, but within the Magistrates' bounds, having first obtained the permission of the Magistrates to project the pier into the Firth beyond low water-mark. The Magistrates were found entitled to dues on passengers landed at the chain pier, (as well as by boats and planks), as if the steam boats had actually entered Leith harbour. The steam boat owners did not take these points by cross appeal to the House.

March 30. 1830. *Sir Charles Wetherell* (for the appellants.)—We maintain, that boats plying to and from other ports, and on other lines, paid always by the ton.

*Lord Chancellor.*—There is nothing to shew why there should be such limits. The statute makes no such limitation as to the line.

*Spankie* (for the respondents.)—The boats were in the use of crossing over to the different ports; not perhaps as regularly as the Kinghorn boats.

*Lord Chancellor.*—It almost appears, from the nature of the country, to be impossible that it could be otherwise.

*Sir Charles Wetherell.*—The respondents are certainly claiming an advantage never intended to be given to them; and to support their claim they have been obliged to argue, that a different thing is the same thing, and that the rambling up and down forty miles is a mathematical line across.

*Lord Chancellor.*—To ply as a passage boat, does not mean only crossing. The passage boats may coast and pass up and down. If the Legislature had contemplated ferry boats merely in the strictest sense of the word, passage boats would not have been mentioned. Why should passage boats be mentioned if only ferry boats were to enjoy the exemption? These are plainly two classes of boats;—a ferry is a passage, but a passage is not always a ferry. The introduction of steam was certainly not in contemplation of parties at the time; but I see no reason for holding that the Legislature did not intend to comprehend all passage boats, although not exactly ferry boats, within the lesser rate.

*Sir Charles Wetherell.*—Justice cannot be done in this case unless your Lordships are satisfied as to the custom. At least there ought to be a remit, to see how this matter stands as to usage.

*Lord Chancellor.*—It is easy to understand why there should be different charges as to boats carrying passengers, and as to boats carrying goods. But, after all, the question rests on the terms of the statute and the relative table of fares, and nothing can be stronger than the terms of the latter. Now, why are we to limit the terms to a ferry boat passing between the ports which are mentioned, and to which the appellants desire the words may be limited, it not being averred that there are not other places on the Firth of Forth from which passage boats, and so on, may sail? It is, in my opinion, impossible to give such a limited construction to the words of the Act of Parliament, which are plain and unequivocal. There is a clause to the same effect in the table of fares. It does not say boat or ferry boat, as desig-

nating the same species of vessel, but it mentions them as distinct classes, 'passage boats, ferry boats, and pinnaces.' As to the custom, it would be extraordinary if we could suppose that the Magistrates' collector did not know what duties were leviable; and if the rate per ton had been leviable from these passage boats, why did he not insist upon these dues until three years after the steam boats began to ply? We are all of opinion that the construction should be given to this clause in the Act, and to the table of fares, which has been given in the Court below, and that the judgment complained of must be affirmed; and I would now move your Lordships that it be affirmed, with L.50 costs. March 30. 1830.

The House of Lords accordingly 'ordered and adjudged, that 'the interlocutors complained of be affirmed, with L.50 costs.'

SPOTTISWOODE and ROBERTSON—RICHARDSON and CONNELL,—  
Solicitors.

DAWSON and MITCHELL, Appellants.  
*Spankie—James Campbell.*

No. 14.

MAGISTRATES OF GLASGOW, Respondents.  
*Lushington—A. M'Neill.*

*Burgh Royal—Superior and Vassal—Servitude.*—1. Circumstances and clauses in titles held, (affirming the judgment of the Court of Session), to constitute a burgage tenure, and not a feu. 2. In a grant by burgage-holding, the town-clerk is alone entitled to act as notary; and the sasine must be registered in the books of the burgh. 3. Held, (reversing the judgment of the Court of Session), that a clause of thirlage of grana crescentia, having these words adjoined, 'and other stuff and 'corn they shall happen to grind, seed and horse corn and bear excepted,' does not import a thirlage of invecta et illata.

THIS was a branch of the case reported ante, Vol. ii. No. 21. March 31. 1830.  
p. 230., which see.

1ST DIVISION.

In the original appeal taken by the Magistrates of Glasgow, the House of Lords 'ordered that the cause be remitted back 'to the Court of Session in Scotland, for them to review generally the interlocutors complained of; and on reviewing the 'same, they are particularly to consider in the said action of 'advocation, whether the Magistrates of Glasgow are entitled to 'any, and if to any, to what dues, in respect of corn or grain 'brought within the liberties or territory of the city or burgh of

March 31. 1830. ' Glasgow, for sale, manufacture, or consumption? and if they are  
' entitled to any such dues, then, whether the lands in possession  
' of the respondents (Dawson and Mitchell) are within such  
' liberties or territory? And it is further ordered, that the Court  
' to which this remit is made do require the opinion of the Judges  
' of the other Division, on the whole matters and questions of law  
' which may arise in this case, as well in the action of advocation  
' as in the action of declarator; which Judges of the other Division  
' are to give and communicate the same: and after so reviewing the interlocutors complained of, the said Court do and  
' decern in the said causes as may be just.'

The First Division of the Court of Session, in obedience to this order, appointed Cases containing the necessary questions to be put to the Judges of the other Division; and having received their opinions, found, (November 14. 1827), ' 1st, That the subjects are held by burgage tenure; that the town-clerk has the  
' exclusive privilege of preparing sasines therein; and that the  
' sasines are to be recorded in the burgh register. 2dly, Appointed  
' the Magistrates to lodge a condescendence of the usage concerning the levying of ladle-dues. 3dly, Found that the thirlage  
' extends to invecta et illata as well as to grana crescentia, seed  
' and horse corn and bear excepted.'\*

Dawson and Mitchell appealed.

*Appellants.*—1. The appellants' lands are held in feu-farm. This is obvious from the titles† by which the lands have been granted and passed. It is an unfounded assumption to hold that the tenendas clause proves the holding to be burgage; at the worst, it only leaves the holding to be ambiguous. Neither is the objection, that the holding is not declared to be ' of the Magistrates' of any importance; for the holding is ' for behoof of the burgh,' which is equivalent to a holding ' of the Magistrates' for behoof of the burgh. Such a tenendas is incompatible with a burgage-holding, which implies that all the payments must be to the Crown. But as the property in question formed part of the common property of the town, it could not be lawfully conveyed in burgage. All authorities concur that such an alienation must be in feu; and, in dubio, the presumption is, that it was intended to be so conveyed. All the other parts of

\* 6. Shaw & Dunlop, 19. where the opinions of the Judges are given.

† For a full deduction of the titles, see report of the original appeal, ante, ii. 230.

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the deed belong to a feu-holding; and the payments and practice have been consistent with that kind of holding. On the one hand, the feu-duty has been regularly paid and accepted; and on the other, burgh taxes have never been paid, which they would if the holding had been burgage. There is no procuratory of resignation, without which no transmission of burgage property can be effected. On the contrary, the infestment is directed to be given in the common form by a precept of sasine in a feu-contract, which necessarily implies, that the vassal was to hold of the Magistrates. Accordingly, the Magistrates, in an after-transference of the lands, confirmed the sasine, (the only symbols of infestment being earth and stone); and thus, extinguishing the subaltern right, made themselves the immediate superiors.

2. The fact of the lands being held in feu-farm also settles the point of registration. In that case, the instrument of sasine must be recorded in the Particular Register of the county, or in the General Register in Edinburgh.

3. If the appellants hold their lands in feu-farm, then, as the feu-duty is a payment *pro omni alio onere*, it excludes the exaction of ladle or any other dues of that description. No doubt such dues are paid, not so much in relation to the tenure, as to the locality. Still the Magistrates had it in their power to depart from such a claim; and by conveying in feu, and stipulating merely for a feu-duty, they have departed from the claim. In point of locality there is no evidence that these lands lie within the limits of the burgh. But, even if the lands formed part of the property of the burgh, ladle-dues are not exigible from grain which does not pass the city ports or enter the city markets. These duties are, as it were, a toll payable from articles that pass the gates. The right to levy them depends on ancient custom. The Magistrates have no express grant to them, nor have they any deed of gift which limits or defines their amount or extent. The right, therefore, being founded on possession, must be regulated by the maxim, '*tantum præscriptum quantum possessum*.' But the Magistrates have not been in the use of levying these dues except on articles passing within the 'city of Glasgow,' *i. e.* within the actual limits of the town; whereas the appellants' distillery is landward, and at a distance from the town or houses.

4. As to the thirlage, the Court below have, from an ambiguous clause, and by vague and uncertain inference, subjected the appellants to the heaviest servitude known in law; but in dubio, *præsumendum est pro libertate*.

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*Respondents.*—1. The lands in question are held burgage. This is evident from the words of the tenendas clause—‘to be holden ‘in free burgage.’ That holding is not changed because the Magistrates reserved a ground-rent, and called it a feu-duty. The successive transferences all support the same conclusion; and these lands have always been treated as burgage lands in the matter of land-tax, poor rates, teind, &c. It is incorrect to say that the Magistrates had no power to make a grant by tenure of burgage. As a corporation, they can hold and convey heritable property. If the property be land without the burgh, they can hold it feu or blench; if within burgh, they can hold it in burgage; and their power of alienating is equal in both. They can grant the one to a purchaser in feu-farm, and the other in burgage, exactly as a private individual can. Had this property been held in feu, there must on each resignation have been a charter of resignation, with precept of infeftment; but throughout the various alienations, the resignation and infeftment have been (as is peculiar to burgage-holding) unico contextu given by a bailie of the burgh. If this be a feu-holding, there is a radical vice in the appellants’ title. The precept in the original grant was introduced, from the distinction not being attended to between the Magistrates as Commissioners of the Crown, and as a Corporation; and it was thought absurd that the commissioners should resign in their own hands. But this precept, if bad, does no harm; if good, the disponee held in free burgage, as is provided in the precept. The symbols are precisely those used where the burgage property is land. It would be anomalous to use the symbol of hasp and staple, where there was no house to admit of symbolical entry. The charter of confirmation was but a blunder, and cannot affect the question. If, till then, the lands were burgage, the confirmation did not change the character of the tenure. Besides, ladle-dues are exigible from all grain brought within the territory of the burgh of Glasgow; and the exaction does not depend upon the passing into the town itself. This the respondents can prove.

2. If the lands are held burgage, then indisputably the privilege of preparing the sasines belongs to the city-clerk, and the sasine must be registered in the burgh books.

3. The property being burgage, the ladle-dues are exigible. Even if feu, the appellants would be liable; for these dues have no relation to the tenure, and can be demanded as a mere impost sanctioned by custom, and not abandoned by any contract. There is abundance of evidence that these lands lay within the limits of the burgh, and were always dealt with as burgh land.

4. The words 'other stuff and corn,' clearly constitute the thirlage of *invecta et illata*. March 31. 1830.

LORD WYNFORD.—My Lords, From the respect which I feel, and which I am persuaded every one will feel, who is at all acquainted with the manner in which justice is administered in the Court of Session in Scotland by the learned persons who preside there, and having the misfortune to differ from them upon one point in this very difficult and important case, I requested of your Lordships time to consider it. My Lords, I have devoted all the time that I could spare from other important avocations, since last we met in this place, to the consideration of this case. I have looked into every book, and into every case, and the consequence has been, that I have convinced myself that the view I had taken of one of the points was erroneous; and upon that I now agree with the Court of Session in Scotland. Upon the most important, and perhaps the only point that is worth deciding, I, however, still retain the same opinion that I first formed, which is against the judgment of the Court below. I deliver that opinion with the less embarrassment, because, though I have the misfortune to differ from the opinion last delivered by the Judges of the Court of Session, I am supported by a judgment previously given by that Court; for it so happens, that the first time this case was brought under their consideration, they decided the point on which I cannot agree with them in a different manner from that in which they have since decided it. The first judgment of the Court of Session was brought by appeal before this House, and your Lordships were pleased to send it back for further consideration, in consequence of great doubts entertained by a noble and learned Lord, (Lord Gifford), of whose services the country is now deprived by his much to be lamented death; and it so happens, that, on a reconsideration, twelve out of fifteen of the Lords of Session formed an opinion different from that to which they had previously come upon this case.

My Lords, an action was brought by the Magistrates of the burgh of Glasgow, for ladle-dues and thirlage. Ladle-dues are dues which derive their name from the ladle, with which a portion was taken out of the different articles that were brought to a town for sale, and for manufacture. Thirlage is paid for corn growing within a certain thirl or district, or for corn brought within that district. An action, as I have stated to your Lordships, was brought by the corporation of Glasgow, claiming those dues, against the present appellants. The defenders thought proper to institute what is called an action of declarator,—a proceeding to which we have nothing analogous in this country,—by which the pursuers call upon the Court to decide certain other points, which they conceived would be of importance between them and the other litigating parties. In consequence of this proceeding, these points were raised :—1st, Whether certain lands, which



March 31. 1880. are the subject of your Lordships' inquiry to-day, are held by bur-  
 gage tenure or by feu tenure? 2dly, Whether the town-clerk of the  
 burgh of Glasgow has the exclusive privilege of passing sasines in  
 those lands, and whether the same are to be recorded in the burgh  
 register?—I have the satisfaction of stating to your Lordships, that the  
 decision on the first question will decide the second, so that, upon that  
 part of the case, I shall have no occasion to give your Lordships any  
 trouble. The third, and, I believe, by far the most important point  
 which is raised, is, whether the respondents are entitled to thirlage of  
 'invecta et illata?' which, your Lordships know, is a duty on corn  
 brought within the thirl; or, whether they are only entitled to thirlage  
 on 'omnia grana crescentia,' that is, on corn which is grown within  
 the thirl?

My Lords, on the first question, namely, whether the subjects, as  
 they are called, are held by burgage tenure, it is, first of all, mate-  
 rial to consider under what terms the burgh itself held this land. It  
 is a principle of the constitution, both in England and Scotland, that  
 burgage tenants must hold from the Crown. These burghs were  
 originally created for the improvement of commerce, and to raise up  
 an authority in the country to counterbalance that of the great  
 Barons. It was necessary, therefore, that those who were members  
 of those burghs, should hold immediately under the Crown; that they  
 should derive their interest from the Crown, and be subject to the  
 Crown, and to the Crown only. There are some burghs in Scotland  
 which do not hold in burgage tenure, but hold their lands of certain  
 great Barons, from whom they derived those lands. But I think  
 there cannot be the least doubt, that the corporation of Glasgow  
 hold by burgage tenure from the Crown; for your Lordships will find  
 in the respondents' case, the charter under which they hold, which  
 is a charter of James IV., and is in these words:—'Dedimus conces-  
 simus et in feudifirmam pro perpetuo disposuimus:—It will be ma-  
 terial for your Lordships to attend to the word 'feudifirmam,' for we  
 have had a great deal of argument, that burgage tenure can be held  
 only on the performance of burgage services; whereas it is clear, that  
 in the grant of this very property, besides the burgage service, it was  
 to be held in fee-farm—a tenure of a description with which we are  
 very familiar in England:—'Tenoreque presentis cartæ nostræ da-  
 mus, concedimus, et in feudifirmam pro perpetuo disponimus, dictis  
 'præposito, ballivis, consulibus, et communitati dicti burgi et civitatis  
 'Glasguensis, et eorum successoribus, totum et integrum dictum bur-  
 'gum et civitatem Glasguensem, cum domibus, ædificiis, hortis, terris,  
 'tam lie outfield quam infield, cultis quam incultis, customis per terram  
 'et aquam, ac etiam fecimus ereximus et constituimus tenoreque præ-  
 'sentis cartæ nostræ facimus constituimus et erigimus dictum burgum  
 'et civitatem Glasguensem in unum liberum burgum regalem, cum om-  
 'nibus libertatibus privilegiis honoribus immunitatibus et jurisdictioni-

*‘bus quas per leges et consuetudinem hujus regni nostri ac liberum burgum regalem pertinent.’* Your Lordships will perceive, therefore, that this is a grant immediately from the King to these burgesses, and proves that the corporation held from the King. March 31. 1630.

This brings us to the next point, Whether the Magistrates granted to Mr Young (under whom the present appellants claim) a holding in free burgage? or, Whether they made to him what is called a mere feu-grant? Now, for the purpose of deciding this question, it would be most important that your Lordships should look at the three instruments under which Mr Young took. Mr Young, in the year 1740, purchased by roup or at auction the property in question. Your Lordships will find, that in the contract upon the roup it is expressly stated, in clear and unquestionable terms, that the purchaser is to hold it in free burgage. That I may not mistake, I will take the liberty of directing your Lordships' attention to the very words of the feu-contract,—*‘to be holden in free burgage, for service of burgh used and wont.’* Your Lordships will find these words repeated in the other instrument to which I have alluded. Your Lordships will also find the same words repeated in that which, I think, is of more importance than either, in the instrument commanding what is called the sasine in Scotland, or as in England we say, the seisin. Your Lordships know, that, till some modern conveyances were introduced, there was no mode of conveying land in England without livery of seisin; that is, either the actual delivery of some portion of the property, as for the whole, or a symbolical delivery of the whole, as by giving the key. That, amongst our simple ancestors, was the mode, and perhaps a better mode than that now used; for there were fewer words used than at present. In the instrument directing the delivery of sasine, Young was directed to hold that sasine by burgage tenure. Now, my Lords, I think if the appellants were to succeed in their argument, it must be a success which they would be sorry for another day; because, if this person does not hold in burgage tenure, it may become a question, what right he has to the lands?—for the persons who held at the time, and who have given his successors sasine, had no authority to give sasine on any other terms than that of holding on burgage tenure. But I am disposed to relieve him from that difficulty, by recommending to your Lordships to say, by your judgment, in conformity with the opinion of the Lords of Session, that these lands are held by burgage tenure. Having stated the terms of this contract, I shall submit to your Lordships, that when a man takes to hold in burgage tenure, he cannot be allowed to say that he does not hold in burgage tenure, against his own words three times expressly repeated; first, by the executry contract,—then by the contract carrying that executry contract into execution,—and lastly, by the act of delivering sasine. He cannot be permitted to say, that he does not hold the lands in the manner, and upon the terms in which, upon those different occasions, he stated that he was ready to accept them, and did accept them.

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But, my Lords, it has been very ingeniously pressed,—and those who have to assist your Lordships to administer justice here, must prepare themselves for arguments, which, though they have not much foundation in law, are urged with so much ingenuity that it is difficult at first to get over them ;—it has been pressed upon your Lordships, that the Magistrates of the burgh at Glasgow could not convey in free burgage, and therefore it is altogether a void conveyance. Your Lordships were referred to an Act of the Scotch Parliament in support of this objection ; and it was insisted with great ability, that a conveyance in burgage tenure would be in direct contravention to this Act of Parliament. My Lords, the terms of the statute are certainly calculated to induce one to think there is something in the argument. By this Act, which passed so long ago as the year 1491, cap. 36. ‘ it is statuit and ordainit, anent the common guid of all our Sovereign Lord’s burghs within the realm, that the same common guid be observit and keepit to the common profit of the town, and to be spendit in common and necessary things.’ My Lords, I thought those words were merely declaratory of that which had been the law before, namely, that corporations should not employ corporate property for the private purposes of the members of the corporation, but for the welfare of the town : but the statute, after making a provision to prevent this abuse, declares, ‘ and attour that the rentes of the burghs, as landis, fishings, farmes, mails, mills, and yearly revenues, be not set but for the year allenarly ; and gif any happen to be set otherways, that they be of no avail, force nor effect, in time coming.’ It struck me at first, that corporations could not grant out property as this corporation had done in the present case ; but on looking to the words with more attention, your Lordships will find, that corporations are not restrained from granting lands, but only from granting the rents of lands ;—and this is the construction that has been put upon those words of the Act by one of the most learned writers upon the law of Scotland, a passage from whose book was cited in the argument ;—but the object of this statute was only to prevent a race of persons growing up, who, I believe, have been found to be most mischievous in another part of the United Empire, namely middlemen, persons who stand between the lessor and the occupier, and impoverish both.

But your Lordships have been referred to a passage of Sir Thomas Hope, in which that writer says, that a burgh royal cannot feu out their common lands. I beg to observe that Sir Thomas Hope must be clearly wrong in this, supposing this to be Sir Thomas Hope’s opinion. Your Lordships know perfectly well, that the whole argument assumes that it would be good as a feu, though not as a grant of burgage tenure. ‘ A burgh royal,’ Sir Thomas Hope is made to say, ‘ cannot feu out their common lands without the King’s express consent, and without an Act of the convention of burghs allowing that burgh so to do.’ My Lords, I confess I was surprised by the reference

here made to the King's consent. But I have the satisfaction to tell your Lordships, that, since this case was before the House, I have looked into Sir Thomas Hope's book, being astonished at the doctrine contained in those words; and I find that these are not Sir Thomas Hope's words. They are contained in a note put in by somebody, I do not know whom, but most likely by Mr Spottiswood, the editor of that book. It is a passage of no authority whatever therefore: It is a passage found fault with by Mr Brodie, in his excellent edition of Lord Stair's Institutes; and unquestionably it is a passage entitled to no consideration:—'Every royal burgh has its own common good or common lands pertaining thereto, which pertain to the burgh in common, and are holden of the King in free burgage, quoad the hail body of the town; but if any particular person acquire an heritable right of these common lands from the town, this is not holden of the King in free burgage, but of the town in feu: which difference is necessary to be observed, by reason that sasines of land holden burgage have sundry privileges by Act of Parliament, which do not pertain to the feu lands of the town.' That is applicable to quite another case. My Lords, the next passage cited for the purpose of supporting this doctrine, is a passage from Mr Erskine, who says, 'If any part of the common lands of a burgh are feued by the Magistrates to a private purchaser, such lands hold not of the Crown in burgage, but of the burgh in feu-farm.' The question is, in this case, whether they are feued or granted in free burgage? And in another place the same writer says, 'Leases for a longer term than three years, of the rents or revenues of burghs royal, whether proceeding from lands, fishings, mills, or other subjects yielding a yearly profit, are prohibited by 1491, cap. 36.; but there is no limitation with respect to leases or feus of the lands or other subjects themselves, which, therefore, may still be lawfully granted by the Magistrates and common council, as if the statute had not been enacted.' My Lords, the passage, as quoted here, goes far enough to shew, that the construction I have ventured to submit to your Lordships is the true construction of this statute. But Mr Erskine adds, 'For no more was meant by the Legislature, than to forbid the granting of leases to those who thereby became entitled to the tack-duties payable by the proper tacksmen or tenants, and who, under the pretence of their undertaking the hazard of the deficiencies or bankruptcies of those tacksmen, frequently obtained such general leases at a considerable undervalue.' These last words shew what was the object of the Legislature in passing this statute, and that we should go beyond that object, if we by construction extended it to a conveyance of land.

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It is then said, that burgage tenures must hold from the King. It is added, these persons do not hold from the King, but from the corporation. If that proposition be made out, these persons are not burgage tenants; for burgage tenants must hold from the King. If,

March 31. 1830. therefore, these persons do hold from the corporation, they are not burgage tenants. But your Lordships will find, by the Scotch law, that if a man be regularly made a burgage tenant, (which Young was, unless all the writers on the subject are wrong), he is, by the act of being made a burgage tenant, made a tenant holding from the King, and it is not necessary to make him a tenant of the King by express words. If it does not require express words to make a burgage tenant a tenant of the King, the case of *Edgar v. Maxwell*, which has been cited, will be found directly to support the judgment of the Court below. The tenancy in *Edgar v. Maxwell* was created precisely in the same way as it is here, except that in that case the tenant was to hold of our lord the King and of the burgh. There was no grant immediately from the King; there was no surrender in order that there might be a grant from the King. If a grant is made to hold in free burgage, it must be derived from the King; for a tenant in free burgage can only hold from the King. When a grant imports to be a grant in free burgage, that grant is to hold from the King. There is, therefore, only a nominal distinction between the case of *Edgar v. Maxwell* and the present case; and the decision in the case of *Edgar v. Maxwell*, which is a decision unappealed from, decides the principle on which the present case depends.

The service of watch and ward is a military service. At the period when Scotland and England were divided, particularly upon the borders of the two kingdoms, the watch and ward was an important military service. It is at all times, however, a service for the benefit of the Crown; because, if a town is not protected by the Crown against a foreign enemy, the internal peace of the country is preserved by that service. The sovereign of the country, therefore, derives an advantage from the performance of it. The performance of this service is a consideration for the grant of lands by the sovereign to him who obliges himself to perform it. But your Lordships will find, that the Scotch writers explain how this is to be done. The work of Lord Stair, your Lordships know, is a book of the highest authority; he is the Lyttelton of Scotland. In lib. 2. title 3. paragraph 38. are these words:—‘The particular persons infest are the King’s immediate vassals; and the bailies of the burgh are the King’s bailies.’ In a very able note of Mr Brodie upon this passage, he says, ‘The community may take infeftment in what is held in burgage; but then as, by such infeftment, it fills the fee,’ (that is, as by the infeftment the feoffer gives up the fee to the feoffee), ‘it follows, that whenever it transfers that property to individuals in burgage, the infeftment of the latter denudes the community.’ The granter ceases to be a tenant of the King, and the grantee, by the very act of conveyance, becomes instantan a tenant of the King. ‘It is a mere impossibility,’ continues Mr Brodie, ‘that the burgh should fill the fee, and yet that the proprietors should be the immediate vassals of the Crown.’ Your Lordships see that he assumes that they are immediate vassals of the

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Crown. 'The latter, however, do hold directly of the Crown; and the office of the Magistrates, in giving infeftments, is purely ministerial as the King's commissioners.' Another objection has been made in this case, namely, that there is no procuratory of resignation. Procuratory of resignation is only necessary where a tenement has passed from a corporation, to whom it has been granted by the Crown, to an individual. It is not necessary when the tenement remains in the corporation, and is to be granted by the corporation. In the latter case, the corporation are empowered to grant as from the Crown, by the authority given them by the original grant. This is clearly explained in a book called *The Juridical Styles*, p. 546. 'The character of erection is in the nature of a commission, constituting the Magistrates commissioners for the Sovereign, by whom they are empowered to receive resignation when necessary, and grant infeftment, to be held immediately of the King.' For these reasons I humbly submit to your Lordships, that the subjects in this case are held by burgage tenure.

I mentioned to your Lordships, that the next question, namely, Whether the town-clerk has the exclusive privilege of passing sasines in these lands? depended entirely on the decision of the former. If this be, as I am of opinion it is, a burgage tenure, it was properly registered in the burgh: Had it been a feu tenure, it must have been registered in the county. Burgage tenures, being peculiar to burghs, can only be registered in the registry of the burghs, and by the proper officer of these burghs.

My Lords, this brings me to the last question to be decided by your Lordships, namely, Are the respondents, that is, the corporation, entitled to thirlage on *grana invecta et illata*, or only on *grana crescentia*?—Now, I shall humbly submit to your Lordships, that they are entitled to thirlage only on *omnia grana crescentia*, and not on *grana invecta et illata*. I stated to your Lordships, that this was the opinion of the learned Judges of the Court of Session in Scotland, when the case first came before them; this was the opinion of two of that learned body when the case was under their consideration the last time; and I am in possession of a very excellent judgment, pronounced by one of those persons, of whose services the country has since been deprived by his death, whom I had the honour of knowing, and whose abilities as a lawyer have long been respected by all Scotland—I mean the late Lord Alloway.\* This learned Judge dissented from this judgment; and he expressed that dissent in a most luminous judgment, now lying on your Lordships' table. My Lords, the grounds on which I have formed this opinion (which I form with diffidence, considering the difference of opinion upon it) are these:—

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\* See G. Shaw and Dunlop, 26.

March 31. 1830. Thirlage is a very severe service, and of all thirlage the most severe is the thirlage of grana invecta et illata. This service applies to a much larger portion of property than any other species of thirlage: But the law leans against restraints on the use of property—no service can be established except by clear and unambiguous terms in the instrument by which it is to be established. The right cannot be extended by implication beyond the express terms of the instrument creating it. If the instrument contains only general terms, the extent to which they are to be carried may be ascertained by usage; but if no usage can be proved, they are to be taken to import only the lightest description of service. Thus Mr Erskine says, (Book ii. title 9. paragraph 33.) ‘as all servitudes are restraints upon property, they are ‘stricti juris, and so not to be inferred by implication.’ Mr Erskine, in the same book, says, § 27. ‘In thirlage constituted in indefinite terms, ‘astricting lands to a mill without mentioning what kind of thirlage; ‘usage must determine the nature and degree of the servitude; and ‘where there has been no sufficient time to discover its nature by the ‘subsequent possession, præsumendum est pro libertate; that meaning ‘ought to be received which formed the lightest servitude.’ Now, my Lords, I have the authority of all the Judges who delivered their opinion upon this subject, that the servitude on invecta et illata is not the lightest; on the contrary, that it is one of the heaviest servitudes known to the law of Scotland. If the terms were general, without any particular terms to controul their operation, your Lordships would limit them to grana crescentia. But if there be in an instrument terms describing a particular service, these services are not to be enlarged by any general terms, so as to be made to embrace other services besides those which are particularly described. The general terms are held to apply only to other cases ejusdem generis with those particularly described. These are the terms of all the deeds:— ‘And bringing the whole grain which shall grow upon the said lands, ‘and other stuff and corn they shall happen to grind, to the town of ‘Glasgow’s milns, and grind the same thereat, seed and horse-corn ‘and bear excepted.’ Here are words which expressly limit the service to grain which shall grow upon the lands. It is difficult to say what is the meaning of the words ‘other stuff.’ But it would be contrary to the rules which regulate the construction of every kind of instrument to say, that such loose general ambiguous terms should embrace a different service, and one more heavy than that which is expressed in the particular terms previously used. At all events, such a meaning cannot be put on such terms in an instrument on which a limited and narrow construction should always be put. The introduction of such terms should be attributed to that tautology of which lawyers, both in England and Scotland, are so fond, rather than to any intention of increasing a heavy impost on the necessities of life. It is said also, that the thirlage of grana invecta et illata is included in the words ‘service of burgh used and wont.’ But I am of opinion, that

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thirlage is not one of the burgh services. If it were, there would have been no occasion for specifying the case of *grana crescentia*; for that species of service must have come within the words services of burgh used and wont, as well as thirlage of *grana invecta et illata*. The specifying any description of thirlage in the instrument shews, that thirlage is not a service of burgh used and wont. The services of burgh used and wont are military services; and thirlage is not a military service. Mr Erskine says, (2. 4. 8.) 'In the erections of the most ancient royal burghs, the *reddendo* is *servitium solitum et consuetum*, which the law interprets to be military service; and in most of the later charters erecting burghs royal, the service specially expressed is watching and warding, which might properly enough be said, some centuries ago, to be of the military kind.' Now, my Lords, I am quite clear, therefore, that these terms cannot mean any kind of thirlage. Your Lordships are to construe this in the way most favourable for the tenant; and your Lordships cannot do that, if you are to extend a special provision so as to make that special provision general. I shall, therefore, advise your Lordships to differ from the opinion expressed by the learned Judges upon this question.

I would, upon the whole, humbly move your Lordships, that you should declare that the subjects are held by burgage tenure: Secondly, That the town-clerk has the exclusive privilege of passing sasines, and that the same are to be recorded in the burgh register: And further, that the respondents are not entitled to thirlage on *grana invecta et illata*, but only on *grana crescentia*.

'The House of Lords ordered and adjudged, that the interlocutor of the Court of Session of the First Division, of the 14th November 1827, complained of in the said appeal, in so far as it finds that the subjects are held by burgage tenure, and that the town-clerk has the exclusive privilege of preparing sasines therein, and that the sasines are to be recorded in the burgh register, and in so far as it appoints the Magistrates to lodge a condescendence of the usage concerning the levying of ladle-dues, be affirmed; and it is further ordered and adjudged, that the said interlocutor, in so far as it finds that the thirlage extends to *invecta et illata* as well as to *grana crescentia*, seed and horse corn and bear excepted, be reversed: And it is further ordered and adjudged, that the said two other interlocutors of the said Court, of the 30th of November and 20th December 1827,\* also complained of in the said appeal, be affirmed: And it is further ordered, that the cause be remitted back to the Court of Session, to proceed therein as shall be consistent with this judgment.'

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\* These interlocutors were orders of Court in regard to the statements as to the fact of usage in levying the ladle-dues.



March 31. 1830. *Appellants' additional Authorities.*—Davis, June 2. 1814, (F. C.) Town of Edinburgh, Nov. 24. 1696, (1898.) 1567, c. 27.; 1681, c. 11.; 4. Geo. III. c. 42.

*Respondents' additional Authority.*—Edgar, June 1743; Brown's Supplement, vol. v. p. 730.

ALEXANDER MUNDELL—RICHARDSON and CONNELL,—Solicitors.

No. 15.

MARIA CAMPBELL RAE JUSTICE, Appellant.  
*Lushington—Brown.*

WILLIAM BURN CALLANDER, Esq. Respondent.  
*Spankie—Murray—A. M'Neill.*

*Adjudication—Warrandice—Passive Title.*—A party having sold land, with warrandice against augmentation of stipend; and, with part of the price received for those lands, bought two estates, which he took, under fetters of strict entail, in favour of himself and spouse in liferent, and to his son in fee, and to a series of substitutes; and having granted over one of the estates an heritable bond of warrandice; and that estate having been adjudged for augmentations;—Held, (affirming the judgment of the Court of Session), that an heir who had made up titles to the far, and not to the liferenter, could not prevent the other estate from being adjudged for augmentations.

April 6. 1830.  
1st DIVISION.  
Lord Eldin.

SIR JAMES JUSTICE, proprietor of the estate of Crichton in the county of Edinburgh, having contracted many debts, executed in 1725, in favour of George Livingstone, a disposition of the estate, in form absolute, but truly in trust, with power to sell, and under burden of payment of debts. Sir James having soon after died, his eldest son, James Justice, in 1737, confirmed his father's disposition, conveyed an estate belonging to himself, which lay intersected with the lands of Crichton, to Livingstone, also in trust, to sell the whole subjects, and, after payment of debts, lay out the surplus in the purchase of lands,—the destination to be to himself (James Justice) in liferent, and to Alexander Justice, his eldest son, in fee, and to a line of substitutes.

In 1738 Livingstone sold these estates to Mark Pringle, and he and James Justice granted a disposition bearing this clause: 'And further, because the said Mark Pringle has paid as great a price for the teinds of the said lands and others above disposed as for the stock, therefore I, the said James Justice, bind and oblige me and my foresaids, to warrant, acquit, and defend the said Mark Pringle from all minister's stipend, future augmentations, and other burdens, of whatever nature, imposed, or that shall be imposed upon the said teind, parsonage or vicarage, the

‘ present stipend excepted.’ Pringle granted a bond for the price, April 6. 1890.  
 in which it was provided, that ‘ for the said Mark Pringle,  
 ‘ and his foresaids, their further security, and in corroboration of  
 ‘ the foresaid clause of warrandice contained in the said disposi-  
 ‘ tion, so far as it concerns future augmentations of minister’s sti-  
 ‘ pend, or other burden that may be imposed on the said teind,  
 ‘ it shall be lawful to the said Mark Pringle to retain so much  
 ‘ of the sums contained in the said bond as may be sufficient to  
 ‘ answer any augmentation of the said teind, until the said George  
 ‘ Livingstone and James Justice shall, at the sight of, &c. secure  
 ‘ so much of the said sums, in such manner as the said Mark  
 ‘ Pringle, and his foresaids, may have sufficient real warrandice  
 ‘ against such eviction of augmentation of stipend, or other bur-  
 ‘ den imposed upon the said teinds, and which eviction is hereby  
 ‘ agreed to be rated at 24 years’ purchase thereof, being the price  
 ‘ paid for the said whole lands and teinds.’

Pringle having paid the full price, Livingstone purchased, with what remained over payment of the debts, the lands of Ugston and Over-Howden. In the disposition of the lands of Ugston the following clause was inserted:—‘ Providing also, that  
 ‘ the said lands and estate above disposed, are and shall be bur-  
 ‘ dened, in real warrandice, with the payment of any augmenta-  
 ‘ tion of stipend that shall at any time hereafter be imposed upon  
 ‘ the lands and estate of Crichton, in terms of the clause of ab-  
 ‘ solute warrandice contained in a disposition by the said Mr  
 ‘ James Justice to Mark Pringle, Esq. of Crichton, dated, &c.;  
 ‘ and with power to the said Mr James Justice, for the said  
 ‘ Mark Pringle, his heirs and successors, their further security, to  
 ‘ grant them an heritable security and infeftment of warrandice  
 ‘ upon the said lands, against the said future augmentations.’

This burden was not nominatim extended over the lands of Over-Howden; but in the deed of conveyance of Ugston and Over-Howden, executed by Livingstone 18th May 1799, in favour of Mr Justice, it was expressly mentioned, that the price had been paid by Livingstone in name and behalf of James Justice, and out of the reversion of the price of the lands and barony of Crichton. This deed was in the shape of a strict entail to James Justice and his spouse, and longest liver of them in liferent, and to Alexander Justice, their son, in fee; whom failing, the substitutes pointed out in James Justice’s deed of 1737.

Mr and Mrs Justice were forthwith infeft in liferent, and Alexander Justice in fee. In the same year James Justice granted to Mark Pringle an heritable bond of warrandice, narrating the sale

April 6. 1830. of Crichton, the obligation of warrandice, the stipulation in the bond for the price, and the reserved power to grant an heritable security over Ugston. It then proceeded thus: 'Therefore wit ye me, pursuant to the foresaid provision and power and faculty contained in the said disposition (of Ugston) to me, and in implement of the foresaid clause of warrandice contained in the said disposition (of Crichton), and provision contained in the said bond (for the price), and in corroboration and fortification of the same, and without any innovation thereof, &c. to be bound and obliged, as I by these presents bind and oblige me, and my heirs and successors whatsoever, not only to warrant, acquit, and defend the said Mark Pringle, and his foresaids, from all minister's stipend, future augmentations, and other burdens of whatsoever nature, imposed, or that shall be imposed upon the said teind, parsonage or vicarage, of the said lands and barony of Crichton,' excepting the present stipend; 'but also, in case of any eviction of the foresaid teind beyond the said stipend presently payable, to content and pay to the said Mark Pringle, and his foresaids, such sums as shall be equal and amount to twenty-four years' purchase of every such eviction, and that at the terms of Whitsunday and Martinmas at which such augmentation shall commence, or other burden be imposed respectively.' He then disposed the lands of Ugston in real security of this obligation, and Pringle was thereupon infeft.

Alexander Justice having predeceased his father, James, the second son, made up titles as heir of tailzie to Alexander under the deed of entail 1739. And James was succeeded by his daughter, the appellant, Miss Justice, under the same entail.

During James's lifetime several augmentations of stipend had been granted to the minister of Crichton; and in the meanwhile the estate of Crichton, with right to the deeds relative to the obligation of warrandice, had been acquired by Sir John Callander's trustees. In relief of these augmentations they obtained decret of adjudication of the lands of Ugston, agreeable to the terms of the heritable bond of warrandice, and also of the estate of Over-Howden.

Of this decret of adjudication of Over-Howden, Miss Justice instituted an action of reduction; but the Lord Ordinary assol-zied the respondent, (now in right of the estate of Crichton), and the Court (1st December 1826) adhered.\*

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\* 5. Shaw and Dunlop, 68.

Miss Justice appealed.

April 6. 1830.

*Appellant.*—1. The obligation to grant warrandice, although originally expressed in general terms, was satisfied by the heritable bond of warrandice granted over Ugston.

2. Even if the obligation remained unlimited, it cannot reach Over-Howden, or affect the appellant. James Justice was solvent when he took the disposition, under fetters of strict entail, of May 1739, to himself and his wife in liferent, and his son, &c. in fee. The personal obligation, therefore, cannot touch Over-Howden, nor can it bind the appellant, who does not represent James Justice, but made up titles as heir of entail. In doing so, she did not incur the passive title of *præceptio hereditatis*. There is no room for the operation of the statute 1621; and if there had been, it is cut off by prescription.

*Respondent.*—1. James Justice came under an obligation of warrandice against all future augmentations. This obligation was not renounced because an heritable bond of warrandice was obtained over Ugston; the previous personal obligation remained entire to its full extent.

2. The lands of Over-Howden having been bought with the balance of the price of Crichton, the appellant, who enjoys Over-Howden, must be liable in the obligation assumed by her ancestor. Alexander Justice, by anticipating the succession, became liable; so did his brother, and so must the appellant. The case is the same as if the claim had been made during the lifetime of Alexander. The entail may be effectual inter hæredes, but cannot affect a creditor of the entailer.

The House of Lords ‘ordered and adjudged, that the interlocutors complained of be affirmed.’

*Appellant's Authorities.*—2. Bell's Com. p. 192.; 3. Stair, 7. 7.; 3. Ersk. 8. 92.; 3. Bank. 7. 3.; 1621, c. 18.; 1469, c. 28.; 1474, c. 54.

*Respondent's Authority.*—3. Ersk. 8. 87.

ALEXANDER FRASER—RICHARDSON and CONNELL,—Solicitors.

No. 16.

GOVERNORS OF HERIOT'S HOSPITAL, Appellants.  
*Lushington—Simpson.*MAJOR M'DONALD, Respondent.—*Murray—Brown.*

*Superior and Vassal—Clause—Consuetude.*—Where a vassal was bound, in a feu-contract, to relieve the superior, and the lands, houses, teinds, and feu-duties, of and from all multures which could be claimed furth thereof, 'and that for all other burden, exaction, question, demand, or secular service, which can anyways be exacted or demanded' for the same; and the feu-duty was equivalent to the rent of the lands; and the superior, from the date of the contract, (a period more than 40 years), paid the minister's stipend;—Found, (affirming the judgment of the Court of Session), that the superior could not throw the burden of stipend upon the vassal.

*Process.*—A charter not produced or founded on in the Court below, not permitted to be referred to in the House of Lords.

April 7. 1830.

1st Division.  
Lord Medwyn.

ABOUT the middle of the 17th century the Governors of Heriot's Hospital acquired the lands of Broughton, lying in the immediate vicinity of the town of Edinburgh. Thereafter, they granted various feus of small portions of these lands to different individuals, averaging a feu-duty of four bolls an acre; and for some also a money price. This price was alleged to be equal to the agricultural rent of the land. Six of these feus were acquired from the respective vassals by Alexander M'Donald, who was succeeded by his son, Major M'Donald. These six feus had been conveyed in six different feu-rights; but Major M'Donald, in completing his titles, included all the feus in one charter, which, however, contained a verbatim transcript of the reddendo clause of all the feus. After specification of the amount of the feu-duty, a clause (slightly varying in expression) was inserted, by which the vassal was bound to free and relieve 'the said Hospital, and Governors thereof, the said house, and the whole of the foresaid lands above-mentioned and disposed, and feu-duties payable for the same, of and from all multures which can be claimed forth of the said lands, teinds, and others above-mentioned, as payable to any mill to which the same may have been astricted; and that for all other burden, exaction, question, demand, or secular service, which can anyways be exacted or demanded for the house, lands, teinds, and others above-mentioned.' In one of the feu-contracts, (1771), the clause was, 'and also freeing and relieving us, and our successors in office, of and from payment of cess, ministers' stipends, and all other public burdens payable forth of the same, from and after the 25th day of March next; and sicklike freeing and relieving us and

‘our successors in office, and the foressaid lands, teinds, and feu- April 7. 1830.  
‘duties payable for the same, of and from all multures which can  
‘be claimed, &c.; and these for all other burden, exaction, ques-  
‘tion, demand, or secular service, which can anyways be exacted  
‘or required for the lands above disposed.’ None of the feuars  
were ever called upon by the Governors of the Hospital to pay any  
part of the stipend of the clergyman of the parish; but an augmen-  
tation having been granted, a portion of the augmentation was, in  
a process of locality, about 1824, imposed upon Major M'Donald.  
He objected to this burden. But the Lord Ordinary found, ‘as  
‘to the claim of relief made by the vassals in those lands (Brough-  
‘ton), and the proprietor of Powderhall (Major M'Donald),  
‘that there is no clause in the feu-rights in favour of their prede-  
‘cessors, binding the Hospital to relieve their vassals of the burden  
‘of payment of the teinds of the lands;—on the contrary, in some  
‘of the feu-rights this burden is expressly imposed on the vas-  
‘sal: That there is no evidence of the allegation, that the feu-  
‘duties payable under the different feu-rights were held by the  
‘parties to be the full value of the lands, both stock and teind;  
‘and the clause in several of the feu-rights, that the feu-duty is to  
‘be for all other burden, exaction, question, demand, or secular  
‘service, which can in anyways be exacted or required for the  
‘lands and teinds above-mentioned, imports only that the supe-  
‘rior can demand nothing beyond the stipulated feu-duty, but  
‘does not import that the vassals are not to be liable for the teinds  
‘of their lands, which were payable to the ministers of St Cuth-  
‘berts and the Crown's donee, the professor of public law: That  
‘the circumstance of the Hospital having, ever since the date of  
‘the feu-rights till the present interim locality, paid the teinds  
‘of the objector's lands, is rather to be ascribed to negligence on  
‘the part of the managers of the Hospital, than to be held suffi-  
‘cient proof that this was the understanding of the parties at the  
‘time of obtaining the various feu-rights; and that it was an im-  
‘plied condition in the grants, that the vassals were to be relieved  
‘of this burden by the superior, as the same practice was observed  
‘as well in regard to those feu-rights where the burden of the  
‘stipend is expressly laid on the vassal, as in those where there  
‘is no such clause. Therefore so far repelled those objections.’

Major M'Donald having reclaimed, the Court, 12th February  
1828, found, ‘From the terms of the feu-contract, and in respect  
‘of the uniform practice of the Hospital having paid all along the  
‘stipend of the lands of Powderhall, that there is sufficient evi-  
‘dence of the understanding of the parties to that effect; and

April 7. 1830. ' therefore they so far altered the interlocutor of Lord Medwyn,  
' reclaimed against, as to find that the Hospital is bound to re-  
' lieve Major M'Donald of the stipend payable from his lands  
' of Powderhall, excepting the two acres and eleven perches of  
' land contained in the feu-contract of 1771.\*



The Governors of Heriot's Hospital appealed.

*Appellants.*—It is a general rule that teinds are debita fructuum, and are payable by the proprietors of the ground producing the fruits, and who reap and enjoy the fruits. But a feuar is a proprietor: the superior only retains the dominium directum. There is neither authority nor principle for maintaining, (even if the fact were true, which it is not), that where the feu-duty is equal to the full annual value of the lands, the superior who draws the feu-duty must be subjected to payment of the tithes. Neither is there any thing in the terms of the different feurights to warrant the judgment of the Court of Session. They are in the ordinary style of such instruments, and do not contain any clause declaring that the stipend shall be payable by the superior.

*Lord Wynford.*—I perceive, in the appendix to the respondent's Case, a very important clause, described to be an excerpt from ' Charter by the Governors of Heriot's Hospital,' dated 20th June 1720. How has that charter got into the Case? It is very material. If it applies to the whole question, it puts the matter very much at rest.†

*Lushington* (for the appellants).—It never was produced in the Court below. It is neither referred to nor founded upon by Judge nor Counsel. If it relates to the respondent's lands, it settles the question in his favour; if not to his lands, then it affords us a powerful argument, by shewing that when stipend was to be relieved against, there was an express clause for the purpose.

*Lord Wynford.*—We must either send this case back, that the import and effect of this charter may be determined, or we must consider this case without taking the charter into our view at all. As there are no traces of it having been relied upon in the Court below, we shall adopt the latter course.

\* Shaw and Dunlop's Teind Cases, p. 156.

† This clause was as follows:—' Nos et successores nostri tenebimur et obligamur tenoreque presentium nos nostraque heredibus, assignis et obligamus dict. magistrum Georgium Gordon ejusque antedict. ab omnibus censibus stipendiis decimis aliisque publicis oneribus impensis, seu imponendis, super dictas acras terrarum cum pertinentiis, tam pro preterito quam pro futuro liberare et relevare.'

*Lushington.*—It is of no avail to the respondent to resort to the alleged usage. Usage may in some matters be permitted to explain a doubt, but not to controul written documents, where the meaning is clear, and the intention of parties manifest; particularly, it would be unjust to permit the vassals to obtain an advantage never contemplated, in a question with an Institution whose managers are varying. In truth, the payments of stipend by the Hospital were made from mere want of attention. April 7. 1830.

*Respondent.*—The Hospital received the full value of the lands, which necessarily implied relief from the burden of stipend. If the Governors of the Hospital receive the whole returns, they cannot object to pay the burden to which the fruits of the subject feued is liable. There is a great similarity between tacks of land and feus; yet it is well known, that unless there be a stipulation to the contrary, the landlord pays the stipend. In point of fact, the respondent pays his proportion in the feu-duty exacted from him; but the appellants wish him to pay that twice. If the superiors had any intention of throwing this burden on the vassals, that would have been expressed in all, as it was expressed in one of the feu-charters. But the best interpretation of the intention of parties is to be found in the conduct of the Hospital. Although repeated opportunities occurred, in the allocation of augmentations to the minister of the parish, for distributing the burden, and of course for placing it on the respondent, had such been the original contemplation of parties, the Hospital uniformly assumed that liability. Usage is good evidence in this case, and leaves no doubt what was the real meaning and understanding of all parties.

*LORD WYNFORD.*—(After stating the facts of the case, and the proceedings in the Court of Session, proceeded as follows:—)

If we are only to look at the documentary evidence, I think that the Governors of Heriot's Hospital are bound to pay the minister's stipend, and not the feuars. If the evidence of usage was admissible to explain the written instruments, the usage proved in this cause shows, that the construction put on the instruments is the true construction. It is not, however, necessary to decide the question, whether the evidence of usage was admissible or not. But old instruments may be expounded by contemporaneous and continued usage. There can be no means of getting at the meaning of old instruments so satisfactorily, as that of seeing how the parties acted under them at the time they were made, and have since continued to act. Now, from the year 1763 down to this time, the trustees have borne the burden of the minister's stipend, and at those times when the stipend was raised they took upon them the increased charge on their estate.



April 7. 1830. It has been said in argument at your Lordships' bar, that this usage has grown up from the trustees not having attended to the interests of the Hospital. But when I consider the respectability of the trustees, and the high estimation in which this charity has been held, I should rather suspect the trustees of want of attention to their own private interests than of neglecting their duty in the execution of such a trust. My Lords, the trustees, by their agreement with the feuars reserved so large a rent for the property, that I am not surprised that they obliged themselves to bear the burden of the minister's stipend. The rent reserved amounted to about one-third of the value of the produce of the land ;—any one who is acquainted with rents will perceive, that this is a rent that no tenant could pay unless exempted from the burdens incidental to the holding of the land.

Although I think that the judgment of the Court below was right, yet the Provost and Corporation of Edinburgh, acting as trustees, might think themselves obliged to have the opinion of this House. They must pay, however, at least a part of the expense that they have put the respondent to by their appeal ; and I therefore move your Lordships that this appeal be dismissed, with L.50 costs.

The House of Lords accordingly ' ordered and adjudged, that ' the interlocutor complained of be affirmed, with L.50 costs.'

*Appellants' Authorities.*—2. Ersk. 3. 10. ; 2. Ersk. 10. 42. Bruce Carstairs, Jan. 23. 1773, (2333.) Colquhoun, Jan. 23. 1798, (Synop. No. 3. Sup. and Vassal). Plenderleath, Jan. 31. 1800, (16,639.) Stewart, July 1. 1806, (Synop. 762.) 2. Connell on Teinda, 479. Hamilton, June 13. 1823, (2. S. & D. 403.) Mill, Feb. 7. 1794, (13,081.)

*Respondent's Authorities.*—2. Stair, 3. 34. ; 2. Bank. 3. 35. ; 2. Ross, Lect. 474. ; Bell on Leases, p. 184. Feuars of Kinross, Dec. 6. 1693, (13,071.) Town of Edinburgh, Feb. 25. 1696, (4188.)

SPOTTISWOODE and ROBERTSON—RICHARDSON and CONNELL,—  
Solicitors.

No. 17.

ROBERT BARCLAY ALLARDICE, and JOHN BOSWELL,  
Appellants.—*Spankie—Brown.*

JOHN ROBERTSON, Respondent.—*Lushington—Dundas.*

*Reparation—Jurisdiction.*—1. Held, (affirming the judgment of the Court of Session), that a Justice of Peace is not protected against an action of damages for a verbal slander, averred to have been made maliciously in delivering judgment against a party under trial before him ; but, 2. held, (reversing the judgment), that the malice is not to be inferred from the words used, but must be proved.

*Process.*—Competent for the House of Lords, on an appeal against a judgment of the Court of Session disallowing an exception, to take the whole cause into consideration.

April 8. 1830.

2d Division.

JOHN ROBERTSON, shoemaker, raised an action of damages against Allardice and Boswell, Justices of Peace in the county of Kincardine, stating, ' that the pursuer, who is a man of unimpeachable moral character, lately had the misfortune to incur the displeasure of certain of the landholders of the county of Kincardine, by the unpardonable offence of shooting at a hare upon the property of one of them, and has been made the victim of a persecution almost unequalled for its rigour, and particularly aggravated in its circumstances: That he was not only dragged before the Justices of the Peace at the instance of the proprietor, under one statute, for the trespass upon his property, and subjected in the whole expenses attending the trial, but an information having been lodged with Francis Wilson, Esq. solicitor of taxes for Scotland, a prosecution was raised against him, under another, at the instance of that officer for shooting without a license; and on the 3d March current, a Court of Commissioners of Supply was held at Stonehaven for the purpose of trying the offence. The gentlemen who presided on that occasion were, Colonel Duff of Fetteresso, Robert Barclay Allardice, Esq. of Ury, John Boswell, Esq. younger of Kincaussie, and George Silver, Esq. of Netherly. Instead of entrusting the conduct of the prosecution, according to invariable practice in all previous prosecutions under the game laws, to the charge of Mr Robert Brown, general surveyor of taxes, and Mr Thomas Kinnear, writer in Stonehaven, the local officer or surveyor of taxes for the district within which the offence was committed, and who were both present as representing the officer for the Crown, the duty of these gentlemen was superseded by the appointment of Mr Charles Munro, writer in Stonehaven, by whom the prosecution was conducted with an ardour rather unusual in such cases. The deposition of the first witness went to prove, not that the pursuer had killed the hare in question, or indeed any other species of game; for he swore that, to the best of his belief, it had been mortally wounded by himself before the pursuer had discharged his piece, but only that he the pursuer had fired at the hare. That although, strictly speaking, this might be considered as a breach of the game laws, yet the pursuer, unconscious of any thing very heinous in the crime, considered it proper to avow his fault, and throw himself upon the clemency of the Court. Accordingly, after the first witness had been examined, his agent stated that enough had already been proved to convict his client, and as he wished to save the Court farther trouble, he admitted the complaint—only express-

April 8. 1830. 'ing his confidence, that, in awarding judgment, the Court would  
 ' deal as leniently with the defender as was consistent with their  
 ' duty, and that they would be pleased to take into their consider-  
 ' ation, that he was the only support of two aged parents. That,  
 ' in place of giving effect to this appeal, the said Charles Munro  
 ' answered, and falsely stated in aggravation of the offence, that  
 ' the present pursuer was a notorious poacher. That upon this the  
 ' said Robert Barclay Allardice spoke, and delivered himself as  
 ' follows, or in words to the following purport and effect: "I do  
 ' not think the defender deserves any mercy, as I am informed  
 ' that, besides being a poacher, he is a thief; that he has been  
 ' known to steal bee-hives and leather; and that Mr Boswell (his  
 ' brother Judge) knows this to be true." Upon which the said  
 ' John Boswell stated as follows, or in words to the following  
 ' purport and effect: "I cannot say as to the bee-hives; but I  
 ' was informed by a respectable farmer, now dead, that he stole  
 ' a quantity of leather." That after some farther discussion, in  
 ' the course of which the said Robert Barclay Allardice main-  
 ' tained his right to comment upon the private character of the  
 ' pursuer, he the pursuer was subjected in the sum of L.20 ster-  
 ' ling, being the highest penalty which the Justices are empowered  
 ' to inflict by the foresaid statute, besides the sum of L.3. 18s. 6d.  
 ' as the duty for a game certificate. Sensible that such a sentence  
 ' was at least warranted by the laws of his country, the pursuer  
 ' refrains from any comment upon its severity; but, traduced and  
 ' calumniated in his character and reputation, as he has thus  
 ' wantonly been, he is forced to appeal to our Lords of Council  
 ' and Session for redress: That the expressions before-mentioned;  
 ' uttered by the said Robert Barclay Allardice and John Boswell  
 ' as aforesaid, are false, calumnious, and malicious, and highly  
 ' aggravated by the place in which they were uttered; and coming  
 ' from persons of so high rank in the country, and while acting  
 ' as administrators of justice in a Court of law, are deeply injurious  
 ' to the pursuer in his character and reputation as a tradesman and  
 ' a member of society, and ruinous to his happiness and prospects  
 ' in life;' and concluding for L.800, 'in name of damages or  
 ' reparation, and as a solatium to the pursuer on account of the  
 ' false, calumnious, malicious, and injurious attack made by the de-  
 ' fenders upon his character, reputation, and feelings as aforesaid.'

The defenders objected to the relevancy of the action, on the ground that an action of damages against a Judge, for defamatory words alleged to have been spoken by him in his judicial capacity, was incompetent; and in particular, when the pursuer

having applied to the Court for mitigation of the penalty, his character became the proper subject for the consideration of the Court, and the observations made relating to that character fell within the limits of their judicial duty. The pursuer replied, that Inferior Judges were subject to be sued for damages; and that observations, malicious, libellous, and impertinent to the matter at issue, (and nothing could be more so than arraigning a person as a thief when considering his offence as a poacher), were good grounds for seeking damages. The Court considered the action relevant, and sent the case to the Jury Court.\*

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Thereafter the following issues were adjusted :—‘ It being admitted that the defenders are Justices of Peace and Commissioners of Supply for the county of Kincardine, and in that character attended a meeting at Stonehaven in the said county on the third day of March 1823; and that the pursuer was then brought before the said Court, upon a complaint preferred against him for unlawfully shooting at game; and being thereof convicted, he did then and there make application to the Court to mitigate the punishment,—1st, Whether, at time and place, and pending the proceedings aforesaid, and in presence and hearing of the persons then and there assembled, the defender, Robert Barclay Allardice, did falsely, maliciously, and calumniously say, that the pursuer besides being a poacher was a thief; that he had been known to steal bee-hives and leather, and that the defender, John Boswell, knew this to be true; or did falsely, maliciously, and calumniously use or utter words to that effect, to the loss, injury, or damage of the pursuer? 2d, Whether, at the time and place, and pending the proceedings aforesaid, and in presence and hearing of the persons aforesaid, the defender John Boswell did falsely, maliciously, and calumniously say, that he was informed by a respectable farmer now dead, that the pursuer stole a quantity of leather; or did falsely, maliciously, and calumniously use or utter words to that effect, to the injury and damage of the pursuer?’ Damages were laid at L. 800.

The Jury returned a verdict ‘ for the pursuer on both issues—damages against both defenders, jointly and severally.’ This verdict was afterwards set aside, and a new trial granted, in respect the verdict was directed against the defenders conjunctly and

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\* The case had been previously sent to the Jury Court, but the defenders having there taken the objection to the relevancy, the case was retransmitted to have the point determined in the Court of Session. The Court found the action relevant, and again remitted it to the Jury Court. See 6. Shaw and Dunlop, 242.

April 8. 1890. severally, while their defences were distinct, and they were not in *pari delicto*.\*

The same issue was again sent to a Jury. It appeared in evidence, (as stated in the bill of exceptions afterwards tendered), that the prosecution was at the instance of the surveyor of taxes, but conducted by a solicitor,—a procedure not usual, and which never had been previously adopted by the surveyor, himself a professional man; that this solicitor had given the information, and was the private agent of Boswell; that the defender's agent, after the examination of several witnesses, was so satisfied that the charge of poaching had been established, that he thought it improper to give more trouble to the Court, but observed, that as the defender was a poor man, as this was his first offence, and he had to support, by his industry, his father and mother, he (the agent) hoped the Court would be lenient in the punishment:—on which Barclay said, that the case was clearly proved; that he did not consider Robertson to be an object of lenity; that he understood him to be a person of very bad character; that he was a thief as well as a poacher. On this the defender's agent said, that he had not made any statement as to Robertson's character, and it appeared to him not a matter for the consideration of the Court. Barclay answered, that he differed from this opinion entirely; that the Court was entitled to take character into consideration; and that he was informed by Boswell that Robertson had been guilty of stealing bee-hives and leather, or in the practice of stealing them; and Barclay appealed to Boswell for the truth of what he, Barclay, had stated. That Boswell answered, that he could not swear to the bee-hives, but he was sure of the leather, as a very respectable farmer now dead had told him so. That the Court fined Robertson L. 20, the full amount of the penalty, together with the price of the license; and he was imprisoned until payment. The defenders, who had taken no issue in justification, did not lead any evidence; and the Lord Chief Commissioner charged, 'that an action for damages was not competent at all against Judges of the Supreme Courts in Scotland, 'for words spoken by them in a judicial capacity, but that such 'an action lay against Justices of Peace, provided the words were 'spoken maliciously. With reference to the malice,—That in all 'cases where the party using the words complained of was entitled to speak of the complainer, the Jury must be satisfied that 'the malice was proved; and the Lord Chief Commissioner di-

‘rected the Jury to take into consideration the words, and the whole circumstances of the case; and to consider, whether Mr Barclay was honestly discharging his duty, and only erred in judgment as to his duty; or whether he acted, not from a fair desire of doing his duty, but was induced by malice to use the words proved. His Lordship farther stated, as his direction on the law, that malice consisted in speaking from bad motives, and that it may either be preconceived or instantaneous; and that in cases like the present, where no evidence was adduced by the defenders to prove that the words spoken were true, they must be understood or presumed to be false, although no evidence of the falsehood was adduced by the pursuer.’

The Jury gave a verdict for the pursuer on both issues, finding each defender liable in L. 125 of damages. Thereupon the defenders moved for a new trial, on the ground of misdirection by the Judge in point of law; but this motion having been refused, (January 15. 1829), they tendered a bill of exceptions, and maintained that the Lord Chief Commissioner should, instead of the direction on the law given by him, have directed the Jury to have found a verdict for the defenders, by directing them, first, That for words spoken by the defenders, when sitting in judgment as Justices of Peace, and deliberating upon or delivering the grounds and reasons of a judicial determination, the defenders are entitled in law to complete protection and immunity, even where the words spoken are alleged to be maliciously spoken. Secondly, et separatim, That the evidence of malice in the present case ought to be direct and express, by proof of malice against the defenders, acting as aforesaid.

The Court of Session, (May 14. 1829), disallowed the exceptions, with expenses.\*

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\* 7. Shaw and Dunlop, 601. The opinions of the Judges, revised by them, and laid before the House of Lords, were:—*Lord Justice-Clerk.*—‘Taking all the circumstances of this case into view, I do not feel much difficulty in disposing of its merits. It is a principle we have always acted upon in considering bills of exception, that we must look at the whole charge, and put a fair construction upon it, and are not to take an isolated observation, but to look at the essence of the whole charge. In applying that principle, though I see words implying it to have been the opinion of the Lord Chief Commissioner, that in no case would an action lie against a Supreme Judge, yet we are bound to look at the case where this observation occurs, which is in an action against Justices of the Peace. Reference has been made to the case of *Haggart v. Hope*. Having given an opinion in that case, I must say that I see no reason to doubt the soundness of that opinion. I think that case was rightly decided; and the principles upon which the decision rested were, in the judgment of affirmance by the late Lord Gifford, most clearly and ably elucidated. But I had no

April 8. 1830. Allardice and Boswell appealed.

*Appellants.*—1. The observations made the groundwork of this action of damages were naturally called for, and were justified by

‘ occasion to say then, nor am I called upon to say now, that in no conceivable case  
‘ would an action of damages lie against a Supreme Judge for words spoken from the  
‘ Bench. In the opinions delivered even in that question, it is not stated that cases  
‘ might not occur where there would be ground of action against a Supreme Judge;  
‘ and I am not prepared to say, that if I go out of a case altogether, and make accusa-  
‘ tions of fraud or the like, which have neither pertinency nor truth, and with which I  
‘ have nothing to do in judicio, I might not be called upon in an action of damages.  
‘ I shall take the liberty of reserving my opinion on such a case till it shall occur.  
‘ With regard, however, to the case before the Court, I do not conceive that the dis-  
‘ tinction between Supreme and Inferior Judges has any thing to do with the question.  
‘ The case is very different from that of a Judge speaking in language, however  
‘ strong, of the case before him, which I conceive every Judge is protected in doing;  
‘ but here he goes entirely out of his way, and takes the liberty of calling the pursuer  
‘ a thief—accusing him of a crime of the deepest dye, inferring infamy, and for which,  
‘ under some of the old Scotch statutes, he might have been tried capitally. I do not  
‘ care whether this was done in a large audience or a small one: it was alike unjusti-  
‘ fiable. From the first moment I never entertained a doubt, that, according to the  
‘ established principles of the law of Scotland, this was actionable matter, and inferred  
‘ a relevant and competent claim of damages. I know nothing, and am not bound to  
‘ be informed, as to the law of England in such a case; but by the law of this coun-  
‘ try, the defenders, in uttering the words complained of, clearly went out of the case  
‘ before them, and thereby rendered themselves liable in damages. Justices of the  
‘ Peace, after finding a person guilty of poaching, have no protection by the law of  
‘ Scotland (which must be the rule of decision here) in stating, as a reason for refus-  
‘ ing to mitigate the punishment, that the offender is entitled to no favour from the  
‘ Court, because he is a thief. And as to the other exception, when there was no  
‘ issue in justification, we cannot doubt that the learned Judge is right in saying, that  
‘ the accusation must be assumed to be false; and therefore I am quite clear that the  
‘ bill must be disallowed.

‘ *Lord Glenlee.*—I agree with what has been stated by your Lordship. It is im-  
‘ possible for me to think that what his Lordship, the Lord Chief Commissioner, said  
‘ about the protection afforded by law to Supreme Judges, had any influence with the  
‘ Jury in their verdict. The observation was certainly extrinsic; and it is inconceivable  
‘ to me how it came to be stated at all.

‘ *Lord Pitmilky.*—I have come to the same result. I concur with your Lordships, that  
‘ there is no occasion to go into the supposed distinction between Supreme and Inferior  
‘ Judges. The only point we have to consider is, Whether the Lord Chief Commis-  
‘ sioner correctly stated, “ that such an action lies against Justices of the Peace, pro-  
‘ vided the words were spoken maliciously?” The defenders say, that his Lordship  
‘ should have directed the Jury, that for words spoken by them, “ when sitting in judg-  
‘ ment as Justices of Peace, and deliberating upon, or delivering the grounds and rea-  
‘ sons of a judicial determination, the defenders are entitled in law to complete protec-  
‘ tion and immunity, even where the words spoken are alleged to be maliciously spoken.”  
‘ Unless we can concur with what the exceptors here say should have been the charge,  
‘ we must disallow the exception; and as it is not my opinion that the law is as con-

the appeal to the Justices for lenity. To make on such an occasion observations was correct and proper, as showing why lenity was or was not granted. The practice is universal. There was therefore no impertinence on the part of the appellants. They did not travel out of the case merely to calumniate the respondent.

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*Lord Wynford.*—In one view the point lies there—Were or were not the appellants' observations made by them as Judges, or had they thrown off the character of Judges? If they were giving an opinion not as Judges, but descending from that character into the situation of a witness, they cannot be protected.

*Spankie* (for appellants).—But the circumstances of the case cannot admit of the supposition that the appellants did throw off the character of Judges. The observations which they made were elicited by the party himself, or, what is the same thing, by his agent. The law on the question is fixed both in Scotland and England. Judges of all Courts, high and low, are freed from all prosecutions whatever, except in Parliament, for any thing said by them in such Courts as Judges. There is no distinction in the Scots law or practice which lessens, in this particular, the immunity enjoyed by the Judge, because he happens to be a Judge of an Inferior Court. Some obscure half-explained authorities may be in the books, not in every degree reconcilable with this principle; but they are deserving of no credit. The learned Judge, therefore, who took this distinction, manifestly misdirected the Jury.

(2.) There has been in this case no proof of malice. The words, no doubt, have been proved to have been spoken; but that is not sufficient—the malice must not be inferential. This is a case of privilege, and that makes the difference between it and the ordinary case of slander by a private individual. In the latter, malice may either be proved, or may be inferential from the subject-matter of the slander. In the case of a Judge, the malice cannot be inferential—it must be proved. But the Jury were charged by the Judge to hold, that the words spoken were,

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\* tended for by the exceptors, it is impossible for me not to disallow the bill. It is not  
 \* Scotch law; and I am convinced that no Scotch lawyer could seriously maintain it to  
 \* be so. If the Lord Chief Commissioner's proposition as to Supreme Judges is not  
 \* well founded, it is just an additional reason for refusing the bill; but I waive giving  
 \* an opinion upon that subject, because it is not necessary for the decision of the ques-  
 \* tion before us, to consider the law as to the Judges of the Supreme Courts. As to  
 \* the second exception, I entirely concur.'



April 8. 1880. in absence of evidence, to be considered false; and the Jury were allowed to infer that they were spoken maliciously.

*Respondent.*—1. Whether a Supreme Judge is liable to prosecution for defamatory words used when acting in the capacity of a Judge, does not decide the present question. Such an immunity, even if enjoyed to the fullest extent by a Supreme Judge, does not extend to an Inferior Judge. It is idle to inquire what is the law of England on this matter. The present is a Scotch appeal, and must be decided on the principles of the Scotch law; and one of these principles is, that an Inferior Judge is liable to prosecution in a civil court for slander, in the character of Judge. This principle is coeval with the law of Scotland, and is interwoven with the decisions of the Scottish Courts, and to be found in the institutional writers from the earliest period to the present day. It is equally plain that there are solid grounds for the action. To maintain, that because a party happened to be before a Judge, that Judge was entitled to heap every abusive epithet on him, and destroy his peace of mind, and ruin his views in life, would be a slander on the law. Accordingly, where the Judge so conducts himself, the mask of judicial procedure will not avail him. It has been debated, and is not perhaps very well settled, whether gross and disgraceful ignorance should not infer the same liability as when the Judge acted maliciously; but no person ever doubted the heavy responsibility attached to malice itself.

2. As to the proof of malice, that is a question for the Jury; they have found malice by their verdict, and, looking to the evidence, they could not have done otherwise. The appellants had no private knowledge of the fact with which they publicly accused the respondent—they brought no evidence of the charge—they did not even bring evidence of the accusation. They cannot, therefore, escape from the charge of malice;—not malice perhaps in the ordinary acceptation of the word, but that malice which the law contemplates. There was no misdirection on the part of the Judge. The appellants did not attempt to justify; and the inference, that the charge was false, followed as a necessary consequence. This falsehood, no doubt, in a privileged case, does not per se infer malice, but is an ingredient of which the proof of malice is composed, and, tota re perspecta, the Jury had no doubt that there was malice.

LORD WYNFORD.—My Lords, I beg to call your attention to a case in which Robert Barclay Allardice, Esq. of Ury, and John Bos-

well, Esq. of Kincaussie, both in the county of Kincardine, are the appellants, and John Robertson, shoemaker at Baldcraigs, parish of Fetteresso, near Stonehaven, is the respondent. This, my Lords, is an action for slander, brought against these two gentlemen, for words spoken by them whilst sitting on the Bench of Justice as Magistrates, deciding a question which came before them under the Stamp Act. My Lords, your Lordships were very properly reminded by the learned Counsel at the bar, that your Lordships, though sitting in England, were sitting as a Scotch Court of Justice, and are to decide this question according to the principles of the Scotch law. My Lords, in giving your Lordships my humble assistance upon this case, I shall endeavour to forget all the English law I have ever known. I shall transport myself beyond the Tweed, and confine myself to the decisions of Scotch Courts, and suffer those only to influence my mind, in the opinion which I express. My Lords, it undoubtedly is fitting that that should be done; for we should do great injustice to the people of Scotland, if we were to alter those laws, of the preservation of which they were so jealous, that the right of having their complaints remedied by them is secured by the Act of Union.

The first question is, whether the interlocutor which sent this question to the Jury Court can be sustained? The summons is in these words:—‘Whereas it is humbly meant and shewn to us, by our lovite, ‘John Robertson, shoemaker at Baldcraigs, parish of Fetteresso, near ‘Stonehaven, that the pursuer, a man of unimpeachable moral character, lately had the misfortune to incur the displeasure of certain ‘of the landholders of the county of Kincardine, by the unpardonable offence of shooting at a hare upon the property of one of ‘them—I certainly do hope that these flights of imagination will be in future omitted in the Scotch pleadings—‘shooting at a hare upon ‘the property of one of them, and has been made the victim of a persecution almost unequalled for its rigour, and particularly aggravated in its circumstances.’—‘That the pursuer was not only dragged ‘before the Justices of the Peace, at the instance of the proprietor, ‘under one statute, for the trespass upon his property, and subjected ‘in the whole expenses attending the trial, but an information having ‘been lodged with Francis Wilson, Esq. solicitor of taxes for Scotland, a prosecution was raised against him, under another, at the instance of that officer, for shooting without a license; and on the 3d ‘March current a Court of Commissioners of Supply was held at ‘Stonehaven, for the purpose of trying the offence. The gentlemen ‘who presided as Judges on that occasion were, Colonel Duff of Fetteresso, Robert Barclay Allardice, Esq. of Ury,’—who is, as your Lordships perceive, one of the appellants,—‘John Boswell, Esq. the ‘younger of Kincaussie, the other appellant; ‘and George Silver, Esq. ‘of Netherly. Instead of intrusting the conduct of the prosecution, ‘according to invariable practice in all previous prosecutions under

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April 8. 1830. 'the game laws, to the charge of Mr Robert Brown, general surveyor of taxes, and Mr Thomas Kinnear, writer in Stonehaven, the local officer or surveyor of taxes for the district within which the offence was committed, and who were both present as representing the officer for the Crown, the duty of these gentlemen was superseded by the appointment of Mr Charles Munro, writer in Stonehaven, by whom the prosecution was conducted with an ardour rather unusual in such cases. The deposition of the first witness went to prove, not that the pursuer had *killed* the hare in question, or indeed any other species of game; for he swore that, to the best of his belief, it had been mortally wounded by himself before the pursuer had discharged his piece, but only that he, the pursuer, had *fired* at the hare. That although, strictly speaking, this might be considered as a breach of the game laws, yet the pursuer, unconscious of any thing very heinous in the crime, considered it proper to avow his fault, and throw himself upon the clemency of the Court. Accordingly, after the first witness had been examined, his agent stated, that enough had already been proved to convict his client; and as he wished to save the Court further trouble, he admitted the complaint, only expressing his confidence, that in awarding the judgment the Court would deal as leniently with the defender as was consistent with their duty, and that they would be pleased to take into their consideration, that he was the only support of two aged parents.' Your Lordships will be pleased to observe, that the agent of the pursuer makes the conduct of the pursuer matter to be considered by the Court, when considering of the punishment to be inflicted. 'That in place of giving effect to this appeal, the said Charles Munro answered, and falsely stated in aggravation of the offence, that the present pursuer was a notorious poacher.' Your Lordships will observe, Charles Munro is no party to this record; but he is the person acting as the attorney; and these words were spoken by him in answer to the appeal for mercy made by the agent for the pursuer. These observations by the agents for the prosecution and the pursuer, induce the Magistrates to use the words which give occasion to the present action. For the pursuer states, that, upon this, Mr Allardice said, 'I do not think the defender deserves any mercy, as I am *informed* that; besides being a poacher, he is a thief; that he has been known to steal bee-hives and leather; and that Mr Boswell (his brother Judge) knows this to be true. Upon which the said John Boswell stated as follows, or in words to the following purport and effect:—I cannot say as to the bee-hives; but I was informed by a respectable farmer, now dead, that he stole a quantity of leather.' That after some further discussion they convicted him of the offence; and that he was subjected in the sum of L.20 sterling as a penalty, besides L.3. 13s. 6d. as the duty for a game certificate. The summons then alleges, 'That the expressions before-mentioned, uttered

'by the said Robert Barclay Allardice and John Boswell, as afore- April 8. 1830.  
'said, are false, calumnious, and malicious;' and this is repeated again,  
my Lords—' false, calumnious, malicious, and injurious.'

I have thought it my duty to read to your Lordships this summons, which is the foundation of the proceeding in this cause, in order that your Lordships may be able to form an opinion upon the accuracy of the judgment pronounced in the first interlocutor. My Lords, the question upon that was—the Magistrates being charged, not only with stating that which was injurious to the character of the man, but with stating that from motives of malice—Whether that can be made the subject of an action? Now, my Lords, this is certainly a difficult, and perhaps a delicate question; because consideration must be had for the situation in which Magistrates are placed; and your Lordships must also take into your consideration, the protection due to those who are living within the districts in which the Magistrates are to administer justice, so as to secure to the Magistrates that degree of independence which is essential to the administration of justice on the one hand, and to protect the public against oppression on the other. My Lords, I cannot help thinking that these great objects will be completely attained, if your Lordships protect Magistrates in all cases in which, although they act indiscreetly, they are uninfluenced by any motives like those of malice; and therefore I should have thought, independent of the authorities, that the Court of Session were bound to consider this as a very fit case to be sent for trial by jury, in order that, under the authority of the Scotch Acts, to which I shall presently have occasion to call your Lordships' attention, it might be inquired, upon evidence, whether there was any foundation for that charge which alone constitutes the foundation of the action, namely, that the words complained of proceeded from malice on the part of those Magistrates? I state to your Lordships, that that is the opinion which I should have formed, independently of any authorities; but I think your Lordships will find, that I am confirmed in that opinion by most of the authorities in the Scotch law with which we have been furnished. I will shortly call your Lordships' attention to the different cases; and as I am inclined to think that this is the first time this question has come before this House, it is material it should be settled on grounds that are satisfactory. Your Lordships have been referred to Lord Bankton's Institutes,—a book which has been spoken of in the course of the argument as one of no authority by one party, and as of very high authority by the other. Lord Bankton appears to me to be a very sensible writer; and I find your Lordships have been influenced by his opinion in a great number of cases. I can scarcely find a single appeal paper in which my Lord Bankton's opinion is not quoted; and it is the first time I have heard an objection made to the authority of that writer. Lord Bankton says, (4. 2. 39.), 'If Judges give unjust sentences wilfully and fraudulently, (which is presumed where they are very gross), or by

April 8. 1830, 'partial counsel, they must indemnify the parties grieved.' My Lord Bankton certainly goes on to state afterwards, that which he would not now be warranted in saying—for he applies this doctrine to the Court of Session; for, according to a decision in the case of my Lord President Hope, the Court below decided that they would not inquire into the question of malice where an action was brought for defamation against the President of the Court of Session. This therefore certainly, to a great extent, impeaches the authority of my Lord Bankton, because undoubtedly he is incorrect here. Perhaps also it may be doubted, whether he is quite correct in saying that malice may be presumed from an unjust sentence, if the injustice of it is very gross; because an unjust judgment may proceed from gross ignorance, and gross ignorance never can be evidence of malice. Perhaps I ought not to refer to English decisions: that, however, has been ruled in cases of the highest authority in this country. But Lord Bankton is fortified in his opinion by Lord Elchies, in the case of *Gibb v. Scott*, which is in Lord Elchies' Notes, (No. 9. Pub. Off.), 'The Lords found the sentences of the Justices iniquitous.' That certainly is a very strong expression. I should not apply the word iniquitous to any judgment that was not given from a corrupt and wicked motive. It is always used in a bad and odious sense. But these Judges must have looked to the effect of the judgment to the parties, and not to the motives of the Court that pronounced it. Considered in this point of view, a judgment may be unjust or iniquitous, without any malicious feeling on the part of the Judge as to the party against whom it is pronounced. His Lordship says,—'The Lords found the sentences of the Justices of the Peace iniquitous;' but continues, 'there was no sufficient evidence,'—in which I think he is quite right; for though the sentence is unjust, that injustice might have proceeded from mistake,—'there was no sufficient evidence that they proceeded from partiality or malice;' and therefore they were acquitted. His Lordship adds that which is most material to this point,—'A partial Judge should not only repair all damages, but deserves the severest punishment.' Now this is undoubtedly a decision immediately upon the point. If malice had been made out, the judgment would have been against the Justices; but malice was not made out, and therefore they were assoilzied, or as we should say on this side of the Tweed, acquitted.

The next case is that of *Leitch v. Fairy*. Here there certainly was that which any Judge would consider as grossly improper conduct, and that proceeding from corrupt motives on the part of Mr Leitch, the Provost; for Mr Leitch, the Provost, was a party in the cause—he had an interest. Now it is a maxim, which I take for granted is part of the law of Scotland, as it is the law of England—that no man is to be a Judge in his own cause; and his interference in the decision of a case in which he has an interest, is unquestionably evidence of corruption. In this case, therefore, in which there was corruption, Mr Leitch,

on a proceeding against him, was compelled to make satisfaction to the party injured by his corrupt judgment. April 8. 1830.

The next case which has been cited is that of Laing v. Watson and Mollison. That was a case where a *meditatione fugæ* warrant was granted, without taking the oath of the creditor for the amount of the debt. The Justice certainly granted this writ irregularly; and there can be no doubt that he was therefore liable to an action. He had caused the party to be arrested, and had not taken an affidavit of the debt. I do not think, however, that that case bears upon this question; because he was sitting, not judicially, but as a Magistrate in an initiatory proceeding in the cause, and was guilty of great irregularity in not requiring that affidavit, which all Judges in all countries require, before there can be proceedings against the person. It is a practice very familiar to us in this country. When I had the honour of being a Judge, we were in the habit of granting writs for arresting parties; but we always took care that the party arrested was sworn to be a debtor. I mention this case, because I am desirous of taking notice of every one which has been mentioned at the bar. But I do not think that case bears upon the present, because, as I have said, the Justice was not sitting in a judicial character, but was sitting merely ministerially on an initiatory proceeding.

The next case is Dawson v. Allardice. That is an extremely strong case, but I do not think it bears much upon the present; because in that case the principle on which the Judge proceeded was, that the Court of Quarter-sessions acted out of their jurisdiction. Now, if men are acting out of their jurisdiction, they can expect no protection.

The next case is that of Sinclair v. the Justices of Caithness, which does not appear to me to bear much upon the present; for that was an action for a libel on a party not before the Court, and therefore the words could not be justified; and if the Justices had been criminally proceeded against, I do not see what answer they could have given to protect themselves against a very severe judgment. They libelled the Sheriff, by going into the whole history of his life, and directing the statement which they made to be stuck up in the public places all around the neighbourhood. The whole conduct of these parties was extrajudicial. If the highest Judge in the land were so to attack the character of another, he would not only be liable to an action, but considered unworthy ever after to sit on the Bench of Justice.

The next case is that of Oliphant v. M'Neill, where a Judge called a witness 'a damned perjured villain.' From what the party said, the Justice might have thought him perjured, and might have expressed his opinion as a reason for the judgment which he gave; but it was highly irreverent in him to use language improper for a man in any situation, and unpardonable for a Judge sitting in a Court of Justice. This was a very important authority upon both the questions to be considered in this case. It is important as establishing, that an action will

April 8. 1830. lie where malice is clearly made out. It is important also to shew, that malice is not to be inferred from the violence or indecency, or, I might say, profanity of the language used. Notwithstanding the want of temper in this magistrate, as the Court thought that he had not acted maliciously, they held that the action would not lie against him.

Robertson v. Preston was a decision of the Ecclesiastical Court. Now, I do not think that bears at all upon the present point; because, in the first place, a very satisfactory answer has been given by one of the learned Counsel, that that case turned upon the question, which was the proper Court of Appeal? whether the Ecclesiastical Court was subordinate to any civil one, or only to the ecclesiastical superiors? However, I think there is another answer which disposes of that case. That defendant was a clergyman. I believe clergymen are in the habit, in this country, of examining whether a man lives a dissolute life; and if he does, of saying that he shall not receive the sacrament until he has repented of his vices. Every friend to religion and morality would lament, if what a minister of the gospel said or wrote whilst acting in the conscientious discharge of that most important duty, should expose him to be brought before any Court of Justice. Courts of Justice are not sufficiently informed on such subjects to be competent to decide on them. Such inquiries would lead to the examination of matters, the public discussion of which would be highly improper.

In the case of Haggart v. Hope, Lord Gifford, in his judgment, to which I have paid great attention, does not make any distinction between supreme and subordinate Courts; but the observations of a Judge must always be taken with reference to the subject-matter on which he is pronouncing judgment. The subject-matter there was an action brought against one of the Judges of the Supreme Court; and in that case the Judges below held, that they would not inquire into the question of malice, because an action could not be maintained. I think they were perfectly right. I hope that it is seldom that a Judge of the Supreme Court will give occasion for such an action; and even if he should, it is not proper that he should be called upon to answer before his equals. It will be better that the proceedings should be taken which the Constitution provides, namely, before this House, which is the proper tribunal for the punishment of the offences of such persons. I certainly should hold, that the Judges of the Court of Session in Scotland are protected; and they cannot, as they were disposed to do in this case, reject that protection. It was not given to them for their benefit, but to prevent the administration of justice from being degraded, and to prevent angry feelings from arising amongst the members of a Court, from co-ordinate Magistrates judging each other.

My Lords, as all these cases were referred to in the course of the argument at your Lordships' bar, I have thought it my duty to take notice of them, that all the authorities supposed to bear on the subject may be brought under your Lordships' consideration. But Gibb v.

Scott, and Oliphant v. McNeill, are the only cases which bear upon the present question; and they establish the principle which I have stated to your Lordships. I am upon this occasion, as upon every other, much indebted to the gentlemen of the bar for the industry and talent they have exerted; but, notwithstanding the industry and talent with which your Lordships have been assisted in this case, not a single case has been cited to meet the authority of those cases to which I have particularly referred. Those cases are founded on the principles of justice; and as they support the judgment of the Court which directed that this case should be sent to the Jury Court, I think that judgment ought to be affirmed.

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The second question to be decided by your Lordships is, Whether, as this case comes before the House on a bill of exceptions, your Lordships are at liberty to look at any other matter than what is presented to you by the objection made at the trial of the cause? If this were an appeal from an English Court, after a decision of the Court of Exchequer Chamber, I should feel bound to tell your Lordships, that you were to decide on the exception raised, and on that only, and that you were not at liberty to look at any other point of the record. But there is a great difference between the old statute of Westminster the second, (13. Edward I. c. 31.) which gives the English bill of exceptions, and the Act of George III. which regulates the Jury Court in Scotland. The statute of Westminster the second says, 'that judgment shall be given according to the exception as it may be allowed or disallowed.' These words confine the authority of the Court to the allowance or disallowance of the exception taken at the trial. The 55. Geo. III. cap. 42. § 7. which gives a bill of exception for the Jury Court, is in these words:—'That it shall be competent to the Counsel for any party, at the trial of any issue or issues, to except to the opinion and direction of the Judge or Judges before whom the same shall be tried, either as to the competency of witnesses, the admissibility of evidence, or other matter of law arising at the trial;—and that such exceptions being taken, the same shall be put in writing by the Counsel for the party objecting, and signed by the Judge or Judges: But notwithstanding the said exception, the trial shall proceed, and the jury shall give a verdict therein for the pursuer or defender, and assess damages when necessary; and after the trial of every such issue or issues, the Judge who presided shall forthwith present the said exception, with the order or interlocutor directing such issue or issues, and a copy of the verdict of the jury indorsed thereon, to the Division by which the said issue or issues were directed, which Division shall thereupon order the said exception to be heard in presence, on or before the fourth sederunt day thereafter; and in case the said Division shall allow the said exception, they shall direct another jury to be summoned for the trial of the said issue or issues; or if the exceptions shall be disallowed, the verdict shall be final and conclusive, as herein-after



April 8, 1830. 'mentioned: Provided always, that it shall be competent to the  
' party against whom any interlocutor shall be pronounced on the  
' matter of the exception, to appeal from such interlocutor to the  
' House of Lords, attaching a copy of the exception to the petition  
' of appeal, so as such appeal shall be presented to the House  
' of Lords within fourteen days after the interlocutor shall have  
' been pronounced, if Parliament shall be then sitting; or if Parlia-  
' ment shall not be sitting, then within eight days after the com-  
' mencement of the next Session of Parliament, but not afterwards;  
' and so as the proceedings on such appeal do conform in all respects  
' to the rules and regulations established respecting appeals: and every  
' such appeal shall be appointed to be heard on or before the fourth  
' cause day after the time limited for laying the printed cases in such  
' appeal upon the table of the House of Lords; and upon the hearing  
' of such appeal, the House of Lords shall give such judgment regard-  
' ing the further proceedings, either by directing a new trial to be had,  
' or otherwise, as the case may require. Provided also, if the excep-  
' tion taken to the opinion and direction of the Judge or Judges shall  
' be disallowed, the verdict shall be final and conclusive as to the fact  
' or facts found by the jury.' By this Act, your Lordships are not  
told that you are only to decide according to the exception as in the  
English statute, but that you are to give such judgment as the case  
may require. Justice will often require that your Lordships should  
look at the whole record. It may often be defeated if you cannot  
look beyond an exception taken at the jury trial. You will often see  
that the objection taken below cannot be sustained, and yet that the  
verdict is wrong, and works injustice. Such an enlarged construction  
ought to be put on this Act, as will enable your Lordships to prevent  
a party from suffering from the error of a Counsel who has not taken the  
right form of exception, or who has taken his exception incorrectly.  
As this is the first time that this point has come before this House, I  
humbly advise your Lordships not to put such a construction on this  
statute as may prevent this House looking into the whole of any case  
that shall be presented to it, and, on a view of the whole case, doing  
substantial justice.

I now, my Lords, come to the last question in this cause, namely,  
Whether, looking at all the points stated in the bill of exceptions, there  
was any evidence to support the verdict found by the jury, that the  
appellants acted maliciously? I agree with the Counsel for the respon-  
dent, that under the proviso in the Act, which I just now read to your  
Lordships, all the facts stated in the bill of exceptions must be taken  
to be true. The question is, whether, admitting all the facts, the jury  
were warranted in inferring malice from these facts? In cases where  
a person is not by his situation called on to express any opinion on the  
character of another, the use of defamatory expressions is evidence of  
malice in the speaker. But a Magistrate is required to give his opinion  
on all matters relevant to points on which he is about to decide: malice,

therefore, is not to be presumed against him from the words used by him, but must be satisfactorily proved. It is admitted on the bill of exceptions, that the appellants are Magistrates, and that the words complained of were spoken when the respondent was before them to answer for an offence of which the appellants had cognizance. Now, were the words used relevant to the matter to be decided? It was admitted, that the respondent was guilty of the offence imputed to him; and the Magistrates were asked not to impose a severe punishment on him, as the offence of which he was accused was his first, and as he had a father and mother who were supported by him. The character of the respondent was not only a matter for the consideration of the appellants, but it was the only matter they had to consider. To the consideration of this they were directly referred by the appeal made to them by the respondent's agent. The defamation complained of is in the Magistrates' answer to this appeal. One of them says, that the respondent was not an object of mercy, for besides being a poacher he was a thief; and the Magistrate immediately gives his reason for considering the respondent a thief, namely, that his brother Magistrate had told him that the respondent had stolen leather and bee-hives. The other Magistrate answers, that he could not speak as to the bee-hives, but he was sure as to the leather, as he was informed of it by a respectable farmer now dead. The agent for the respondent does not tell the Magistrates that they had been misinformed, but says, that, whether the respondent was a thief or not, should make no difference in the punishment then to be inflicted. The Magistrates thought, and I agree with them, that the previous conduct of the offender was to be considered in inflicting punishment. Judges constantly increase or diminish the severity of punishment, according to the previous conduct of criminals. They often state as a reason for giving a different punishment to several persons convicted of the same offence, that those whom they punish severely have been convicted or charged with crimes before, or have had no character given to them on their trials. But does any man think that either of these Magistrates said what they did not believe to be true? If they believed what they said to be true, according to the cases to which I have referred your Lordships, there is an end of the matter, and the verdict cannot be supported. They did not affect to speak of their own knowledge, but from what they had been told by other persons. The answer given to them by the respondent's agent, would incline one to think the report on which the Magistrates acted was not altogether unfounded.

It seems that Munro, who acted as agent for the prosecution, was the private agent of the defender Boswell. If there had been any proof that he was employed by Boswell to conduct this prosecution, the jury might have been warranted in finding malice, for it would be improper for a Magistrate to employ an agent to conduct a case which such Magistrate was to decide. But there was no such proof. These agents act for many different persons. It does not therefore follow,

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April 8. 1830. that because Munro is sometimes employed by Boswell, he was acting for him in the conduct of this prosecution. If this case goes to a new trial, Munro may be examined as to this fact, which upon the last trial seems to have been assumed without any proof. This case was tried by a common jury. Men who compose such juries frequently entertain strong prejudices against those who belong to a higher class, particularly in cases where complaints are made of the undue exertion of authority. In this case, the learned Judge who presided strongly pressed the jury to find a verdict for the appellants. He who heard the witnesses, and who therefore could form a much better judgment upon their testimony than we can, thought that malice was not proved. Agreeing entirely with that learned Judge, I advise your Lordships to send this case to a new trial. I hope, my Lords, that our fellow-subjects in the north will find, that the giving them the trial by jury is the greatest benefit that has been conferred on them since the Union. The knowledge of the business of the world which juries possess, and which the occupations of Judges prevent them from acquiring, renders the assistance of juries in the administration of justice most valuable. But the trial by jury would be an evil instead of being an advantage, if erroneous verdicts could not be set aside. If a question of fact be doubtful, Courts do not disturb verdicts, even when they incline to think them not right; but if verdicts without any evidence are permitted to stand, the rights of parties will be decided on, not according to justice and law, but according to the prejudices or the arbitrary discretion of juries. By granting a new trial, the cause is not withdrawn from a jury, but is only sent down to be reconsidered by another jury. After the fullest consideration, I cannot prevail on myself, that this verdict ought to stand. For these reasons I humbly move your Lordships that the interlocutor of the 13th of December 1827 be affirmed; that is, the interlocutor which relates to sending this case to a jury; and that the interlocutor of the 14th May 1829 be reversed, and the cause remitted back to the Jury Court. With respect to costs, I think that this is not a case in which costs should be given.

‘ The House of Lords ordered and adjudged, that the interlocutor of the Lords of Session of the Second Division, of the 13th December 1827, and also the three orders of the Jury Court, dated respectively the 7th of March, the 10th of July, and the 19th of December 1828,\* complained of in the said appeal, be affirmed; and it is declared that this House is of opinion, that the action of damages in the said appeal mentioned could not be maintained without proof of malice, and that there was not in this case any proof of malice, nor any evidence from which malice

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\* These orders were, to try by a jury the adjusted issues, and the order for costs of that trial in favour of the pursuer.

‘ could be inferred: And with this declaration it is further ordered and adjudged, that the said order of the Jury Court of the 15th of January 1829, and also the said interlocutor of the Lords of Session, of the Second Division, of the 14th May 1829, also complained of in the said appeal, in so far as it declares the verdict final and conclusive in terms of the statute, and finds the respondent entitled to the expenses incurred by him in discussing the bill of exceptions, be reversed; and it is further ordered, that with this declaration and reversal before-mentioned, the cause be remitted back to the Court of Session, that the same may be sent by the said Court to the Jury Court, with an order that a new trial may be allowed, if the respondent shall so desire.’

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*Appellants' Authorities.*—Haggart, April 1. 1824, (2. Shaw's Appeals, 133.); 1. Hawkins' Pleas of Crown, 72. 6. Robertson, Aug. 11. 1780, (7465.) Borthwick on Libel; Starkie on Slander; Starkie's Law of Evidence; 6. Howell's State Trials, p. 1094. Holroyd v. Breare, 2. Barn. & Ald. 473. Reynolds v. Kennedy, 1. Wilson, p. 332.

*Respondent's Authorities.*—4. Stair, 1. 6.; 4. Bankton, 2. 39.; 1. Hume, p. 402., and vol. 2. p. 48. last edit. Leitch, July 27. 1711, (13,946.) Lang, (8555.) McNeill, 1776; (5. Brown's Supplement, 574.) Robertson, (7465.) Hamilton, March 10. 1827, 5. S. & D. 569.; 1. Blackstone, p. 353.; 3. Burn's Justice, (by Chetwynd), 138.; 4. Mur. 233. Tabart v. Tipper, (1. Campbell, 350.); Wallace's System, 9. 11. 77. Leslie, June 11. 1822, (3. Mur. 121.) Sinclair, 1767, (5. Brown's Sup. 574.) Stewart, July 19. 1694. Black, July 16. 1706. Pitcairn, Feb. 18. 1715; (See Brown's Synopsis, p. 2142.) Gibb, Jan. 11. 1740; and Anderson, July 19. 1753; (Elchies, No. 9. and 19. voce Public Officer.) Anderson, Jan. 3. 1750, (13,949.) Dawson, Feb. 18. 1809, (F. C.) Adye on Courts Martial, p. 64.; Digest of Law of Libel, p. 132. Garnet, May 28. 1827; 6. Barn. & Cres. 611.

DUTHIE—RICHARDSON and CONNELL—ARNOTT and ELDERTON,—  
Solicitors.

ROBERT WHITEHEAD, Appellant.—*Murray.*

No. 18.

JOHN ROWAT, Respondent.—*Brown.*

*Process.*—On a recommendation by the House of Lords, a question of disputed accounting for work done settled by amicable adjustment of parties, and the adjustment made the subject of the order and adjudication of the House.

WHITEHEAD employed Rowat, carpenter and builder, to build certain premises for him in the town of Hamilton. On the work being done, Whitehead disputed the amount charged. After a

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2D DIVISION.  
Lord Cringletic.

April 8. 1830. great deal of procedure, the Court of Session decerned against him,\* whereupon he appealed.

On the appellant's Counsel having proceeded some way in the opening, Lord Wynford suggested, that the case from its nature was one highly fitted for adjustment by the parties, and recommended that they should confer together with the view to an arrangement. A consultation accordingly took place, and this adjusted order was issued.

‘ It is ordered and adjudged, that the interlocutors complained of be, and the same are hereby reversed; and it is declared, that the respondent is entitled to demand from the appellant the sum of L. 1402. 9s. 3d., being the sum concluded for by the respondent in the action instituted by him in the Court of Session in the month of October 1817, with the legal interest thereon from the date from which interest was allowed by the said Court, under the second action brought by the said respondent, under deduction of all payments made to him on account, in consequence of interim decrees or otherwise: And it is further ordered, that with this declaration the cause be remitted back to the Court of Session, to do therein as shall be just.’

MONCREIFF, WEBSTER, and THOMSON—RICHARDSON and CONNELL,—Solicitors.

No. 19.

GEORGE BROWN, Appellant.—*Lushington*—*Brown*.

ALEXANDER EWING, and OTHERS, Respondents.

*Bankrupt—Sequestration.*—A petition for approval of composition by a bankrupt having been refused by the Court of Session, and the opposition by the creditors who appeared in that Court having been withdrawn,—the House of Lords reversed, but remitted to allow a scrutiny if required by any opposing creditor.

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Lord Newton.

THE estates of the Dalmarnock Dye-work Company, and of the Greenhead Foundry Company, and of George Brown and Thomas Buchanan, the individual partners, having been sequestrated, an offer of composition both on the Company and individual estates was made, and a petition was presented to the Court for approval. No opposition was offered in so far as regarded the composition on the Company estate; but the petition for approval of the composition on Brown's individual estate having

\* 5. & 6. Shaw and Dunlop, 19. & 572.

been opposed, on the ground, inter alia, of an alleged want of the legal concurrence of nine-tenths of the creditors present, as required by statute, the Court, after some procedure, (7th March 1830), refused the petition in so far as concerned the individual estates of the said George Brown, but, in respect of no opposition being made, granted the prayer thereof quoad ultra in so far as regarded the Company estates, reserving all claim on the individual estate of the said George Brown.\* George Brown appealed; but the Counsel for the respondents stated at the bar of the House of Lords, that he was not instructed to support the judgment complained of, or resist the appeal.

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'The House of Lords ordered and adjudged, that the interlocutor or judgment complained of be reversed; and it is further ordered, that the cause be remitted back to the Court of Session, with instructions to grant a scrutiny in case the same should be required by any of the objecting creditors, and then to proceed further to determine the cause: And it is declared, that if no such scrutiny is demanded by such objecting creditors, the prayer of the original application by the appellant for his discharge ought to be granted.'

ALEXANDER DOBIE—CALDWELL and THOMSON,—Solicitors.

ALEXANDER CAMPBELL, Appellant.  
*Brougham—James Campbell.*

No. 20.

WILLIAM M'FARLANE, Respondent.—*Lushington—  
John Campbell.*

*Public Officer—Title to Pursue.*—Circumstances under which the Court of Session, having suspended a depute-clerk of the peace, and prohibited him from exercising the duties or drawing the emoluments of the office for twelve months, found him liable in expenses, and ordained the deliverance to be inserted in the Books of Sederunt,—the House of Lords remitted to the Court to recall the interlocutor, except as to payment of the expenses; and ordered the party to pay the costs of appeal, declaring that the House awarded such costs in lieu of such suspension.

ALEXANDER CAMPBELL, joint depute-clerk to the Justices of the Peace for the county of Dumbarton, was also clerk to the trustees for that district of the same county within which part of the Cumbernauld turnpike road passes. Being informed that

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2D DIVISION.

\* 6. Shaw and Dunlop, 739.

April 8. 1830. James M'Farlane, and William M'Farlane, had been guilty of evasion of the tolls of Condorrat, (one of the turnpikes on that part of the Cumbernauld road which lies in Dumbartonshire), he presented, as clerk to the road trustees of the district, an application to the Justices of Peace of the same district, and within which he acted as their clerk, praying for statutory penalties, (to one-half of which Campbell had right), for a fine, and for damages to James Ruchead the toll-keeper, his wife and sister-in-law, who, it was alleged, had been severely maltreated on the occasion of the evasion. The customary warrant of apprehension was written for the signature of the Justices by M'Donald, one of the clerks of Campbell and Barlas, writers in Glasgow, of which firm Campbell was a partner. It was directed against both the M'Farlanes, but was only executed against William, who was accordingly apprehended, and brought before the Justices at Kirkintulloch for examination. He was attended throughout the proceedings which followed by a procurator. Campbell did not attend at all, but M'Donald conducted the prosecution.

The conclusion for damages was not pressed, but no dismissal of it was entered on record; and on the toll-keeper, his wife, and sister-in-law, being adduced as witnesses, William M'Farlane's procurator objected to their admissibility; but the objection was repelled, and their evidence taken cum nota. It appeared also, (although the relationship was not known to Campbell's clerk or to M'Farlane), that one of the sitting Justices was maternal uncle to the toll-keeper.

In the meanwhile James M'Farlane, who had been beat and cut by the toll-keeper on the occasion when the evasion was alleged to have been practised, had raised an action against him, and obtained a judgment from the Sheriff of Dumbartonshire, awarding L. 14 of damages, and L. 2 to the prosecutor as damages and fine for the assault, which, on appeal to the High Court of Justiciary, was increased to L. 100 of damages, and L. 5 to the procurator-fiscal, with expenses.

When the Justices met to pronounce judgment, William MacFarlane's procurator protested against the legality of the action, because, among other reasons, the pursuer of it, Campbell, was the clerk of Court. The Justices, however, sustained the action, found that William M'Farlane did attempt to evade the toll at Condorrat, fined him in the mitigated penalty of L. 2, and found him liable in L. 3 of expenses.

James and William M'Farlane then presented a petition and complaint to the Court of Session, charging Alexander Campbell

with a violation of the Act of Sederunt, 6th March 1783, on the ground that he was clerk of the Court in which he had raised the above action against them, and praying that he might be found liable in penalties for malversation in office, be deprived of, or suspended from his office of depute justice of peace clerk, and found liable in expenses.

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Campbell objected to their title, in respect they had not obtained the concurrence of the procurator-fiscal; and, separatim, that the warrant had not been executed against James. On the merits, he justified his conduct by referring to the Cumbernauld road local Act, and to the general turnpike Act; and contended, that he personally did not interfere, and was not at any rate liable for the errors, if any, of the Justices who presided.

The Court of Session pronounced this judgment: ‘ Repel the objections to the title of the complainer, William M'Farlane, to insist in the said complaint; but in respect that the original complaint was not served upon James M'Farlane, nor any procedure held therein with respect to him, find, that he has not qualified a sufficient title and interest to support its conclusions: Find, That the respondent, Alexander Campbell, junior, in respect of his having, as district clerk of the road trustees of Dumbartonshire, instituted a complaint, concluding not only for the statutory penalty on account of an alleged evasion of the toll of Condorrat, (the half of which penalty was by the statute declared to be payable to himself), but also for certain other sums as indemnification to James Ruchead, the toll-keeper, his wife and sister-in-law, who afterwards were admitted as witnesses for the complainer cum nota in that very process, although no dismissal of the process quoad them appears to have been entered on the record; and in respect of his having unnecessarily brought the said complaint before the Justices of the Peace of the Kirkintulloch district of the county of Dumbarton, in which Court the said Alexander Campbell, junior, then held the office of clerk by deputation from the principal clerk of that county; and that part of the proceedings upon this complaint, and various parts of the proof led in support thereof, appear to have been conducted and written by John M'Donald, the clerk of Campbell and Barlas, writers in Glasgow, of which copartnery the said Alexander Campbell was then a member; and during which proof it also appears, that a maternal uncle of the said James Ruchead actually sat as one of the Justices of Peace,—did act contrary to law, and in a manner subversive of the impartial administration of justice; and the Lords therefore



April 8. 1890. 'suspend the said Alexander Campbell, junior, from his office  
' of depute-clerk of the peace of the said county of Dunbarton,  
' for the space of twelve calendar months from and after the first  
' day of April next, and prohibit and discharge him from either  
' directly or indirectly exercising any of the duties, or drawing any  
' part of the emoluments of the said office, during the foresaid  
' period;' find him liable in expenses; 'and ordain this deliver-  
' ance to be inserted in the books of sederunt of this Court.'  
Campbell paid L. 90. 17s. 10d. of expenses, and the entry was  
made, as ordered, in the books of the Court of Session.\*

Campbell appealed.

*Appellant.*—1. The respondent's application is defective in form. It does not conclude for damages, but for punishment, consequently the procurator-fiscal ought to have been made a party.

2. No personal motives induced the appellant to take any share in the proceedings complained of. By the local road Act and the general road Act, he was, as clerk to the trustees, not merely authorized, but invited to institute and conduct suits against parties accused of evasion of turnpike duties. In the present instance, however, he did not act; and although the suit was conducted by a clerk who happened to be one of Campbell and Barlas's clerks, that clerk was more the servant of the Justices of Peace than any other person. The Justices may have acted improperly in admitting, even cum nota, the tollman, and his wife and sister-in-law; and it may have been very reprehensible in the Justice who was maternal uncle to one of the parties interested, to sit and entertain the case; but these were no acts of the appellant. Besides, the Act of Sederunt on which the respondent founds, applies to the party acting as agent, but not to that of a party conducting his own suit, which the appellant was authorized to do by the statute regulating the trust of the road in question.

*Lord Chancellor.*—I see nothing at present to satisfy me that this gentleman acted intentionally wrong. I think he acted incorrectly. What he did was inconsistent with the Act of Sederunt: still, to suspend him for a year was rather a hard measure; and I observe that three of the Judges in the Court below were inclined for a more lenient sentence, although, no doubt, the Lord Justice-Clerk considered it a very serious case.

*Dr Lushington* (for the respondent).—The appellant resorts to several very narrow and untenable distinctions; but he plainly was

guilty of most illegal conduct, which led to great injustice. The parties who were so barbarously used by this turnpike-keeper, and against whom they recovered heavy damages for the assault, are condemned on the evidence of that keeper, and his wife and step-sister; and the sentence proceeded from a bench of Justices, one of whom was the maternal uncle of that very keeper.

*Lord Lyndhurst.*—That cannot be palliated certainly. Still this is a very severe infliction upon a professional man.

*Dr Lushington.*—The extent of punishment must be measured, in some cases, by the necessity of putting an end to improper practices. The appellant's conduct has put the respondent to very heavy expense.

*Lord Chancellor.*—I do not know how you are injured if all those expenses are paid by the appellant. I mean the expenses arising out of this irregularity. I observe one of the Judges proposes a fine of L. 100, and expenses; and it would be better for the appellant that the sum he pays should be in the shape of expenses rather than that of a fine. I understand he has paid the expenses in the Court below. There has certainly been an irregularity, without alluding to the other matters; but this suspension is a reflection on character.

*Campbell* (for the respondent).—It is by no means the wish of those I represent to press any thing hardly, beyond what may be considered the recommendation of your Lordship.

*Lord Chancellor.*—If this gentleman pays all the costs incurred, and no fine, I should think that will be a sufficient infliction. The costs will be a warning against a repetition of offences of this kind, and will indemnify the party complaining. Let there be no suspension; but it must be understood that these costs are considered by this House in the nature of a penalty, for the irregularity of which this gentleman has been guilty. The Court of Session will understand, that we do not reverse the judgment in point of law, but substitute one punishment for the too severe one inflicted.

On the motion of his Lordship, the House of Lords ordered and adjudged, that the cause be remitted back to the Court of Session, with instructions to recall so much of the interlocutor of the 6th of March 1827, complained of in the said appeal, as suspends the said Alexander Campbell from the office of deputy-clerk of the peace of the county of Dumbarton, and prohibits and discharges him from exercising any of the duties, or drawing any part of the emoluments of the said office; and ordains the deliverance to be inserted in the books of sederunt: And it is

April 8. 1830. 'further ordered, that the appellant do pay to the respondent the sum of L. 269 for costs; and it is declared, that this House awards such costs in lieu of such suspension.'

*Appellant's Authorities.*—44. Geo. III. (Local Act); 4. Geo. IV. c. 49. Darby, Feb. 10. 1786, (F. C.) M'Intosh, Nov. 18. 1815, (F. C.); affirmed in House of Lords, March 9. 1819; (1. Bligh, 272.) Murray, Dec. 15. 1824; (3. S. & D. 401.)

*Respondent's Authorities.*—A. S. March 6. 1783. A. S. Feb. 4. 1786. Seller and Thomson, Feb. 11. 1809, (F. C.) Campbell, July 10. 1824, (3. S. & D. 245.) Adam, July 5. 1824, (S. & D.'s Justiciary Reports, p. 119.) M'Millan, Dec. 10. 1825, (4. S. & D. 297.) Erston, (ibid. 299.)

MONCREIFF, WEBSTER, and THOMSON—RICHARDSON and CONNELL,—Solicitors.

No. 21.

SIR ALEXANDER INGLIS COCHRANE, Appellant.  
*Lushington—Brown.*

DR DAVID RAMSAY, Respondent.—*Murray—Keay.*

*Service.*—Held, (reversing the judgment of the Court of Session), that a general service to an ancestor, where there has been a prior general service by another party to the same ancestor, is incompetent.

April 29. 1830.

2D DIVISION.  
Lord Mackenzie.

ALEXANDER INGLIS of Murdieston, in 1719, executed a deed of entail of that estate in favour of Alexander Hamilton; whom failing, to certain substitutes nominatim; whom failing, 'to the eldest lawful son of William Inglis, son to the deceased Nathaniel Inglis, chyrurgeon in Kirkaldy, my brother, and the heirs-male of his body; which failing, to his other lawful sons, and the heirs-male of their bodies successive, one after another;' whom failing, the heirs-female of the institute, and of the first substitute; 'which failing, to the heirs-male procreate, or to be procreate, lawful, betwixt William Sheoch, shore-grieve at Clackmannan, and Catherine Inglis, his spouse, daughter to the said umquhill Nathaniel Inglis; which all failing, to my own nearest and lawful heirs and assignees whatsoever: and failing of heirs-male, I hereby declare that it shall be leisome or lawful for the eldest daughter or heir-female to succeed without division.' Alexander Hamilton, the institute, succeeded, and made up titles under the deed of 1719. His sons, Alexander, Gavin, Walter, and James, successively succeeded. The two former made up titles under the entail; but James executed, in 1802, a new deed of entail in

favour of a different line of substitutes. The first person called (Colonel James Hamilton) having died without issue, the succession opened to the next substitute under the new entail, Sir Alexander Inglis Cochrane, who, having made up titles, entered into possession in 1815. April 29. 1830.

In the meanwhile William Inglis, the son of Nathaniel, had expedé in 1720 a general service as heir of his uncle Alexander, the entailer.

Dr Ramsay, alleging that he was great-grandson of Catherine Inglis, daughter of Nathaniel, and spouse of William Sheoch, and that, as such, he was the substitute entitled to succeed under the old entail; and conceiving that James Hamilton had no power to alter the destination, granted, with the view of trying this question and the validity of his claim, a trust-bond for L.15,000 to his agent, George Dunlop, W. S., whereon the latter raised an adjudication of the estate, and got decree.\* Thereafter Dr Ramsay obtained a general service as nearest lawful eldest heir-portioner in general of Alexander Inglis the entailer, to whom William had been previously served. In that character he raised an action of reduction improbation, and declarator, against Sir Alexander Inglis Cochrane, and the other heirs under the new entail, to have it found that the succession of the estate of Murdieston had opened to him, and concluding for reduction of the new entail, and of Sir Alexander Inglis Cochrane's special service under it. Sir Alexander then raised an action of reduction of Dr Ramsay's general service, inter alia, because 'a general service as heir-portioner, or eldest heir-portioner to the said Alexander Inglis, by the defender, or any other person, at this day, is altogether incompetent; William Inglis, the eldest son of the said Nathaniel Inglis, (through which Nathaniel the defender pretends to connect himself with Alexander), having many years ago, indeed so

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\* Before adopting this measure, Dr Ramsay had, in 1818, executed a disposition of the estate of Murdieston in favour of Mr Dunlop, and his heirs and assignees, qualified by a back-bond; and he was thereafter served heir of line in general of Alexander Inglis of Murdieston. Mr Dunlop, founding on this service, raised an action of reduction of Sir Alexander Inglis Cochrane's titles to Murdieston, and was met by a counter-action of reduction of Dr Ramsay's service. The Court, 'in respect that it is evident that the proof adduced did not authorize the verdict of the jury,' reduced. Dr Ramsay had also taken out a brieve for serving himself heir of provision to Alexander Inglis; but on advocacy of the brieve to the Court of Session, he abandoned it. In the meanwhile Mr Dunlop had raised an action of adjudication in implement of the disposition; but the Court dismissed the adjudication as incompetent, and the House of Lords (31st March 1824) affirmed the judgment, with L. 100 costs. See 1. Shaw's Appeal Cases, p. 115.

April 29. 1830. ' far back as the year 1720, been served heir to his uncle Alexander by a general service, as appears from his retour in the public records; and of course there was no room thereafter for any other person being served heir of Alexander by a general service; and the defender's pretended service, as heir to Alexander, is therefore on this ground alone, were it liable to no other objections, palpably null, and must be reduced and set aside.'

The Lord Ordinary having, in respect of the case of Carmichael v. Carmichael, and opinions said to have been given adverse to it, reported the cause, the Court appointed mutual memorials ' on the question, whether, after a title by a general service having been expedite by William Inglis, nephew of Alexander Inglis of Murdieston, as nearest and lawful heir to his uncle, a subsequent general service of any person, as eldest heir-portioner to the said Alexander Inglis, is a competent title?' On advising these memorials, the Judges being equally divided, the other Judges were consulted, and the result was a judgment, finding, ' that the general service of Dr David Ramsay, defender, as an heir-portioner of Alexander Inglis of Murdieston, is a competent and regular proceeding, notwithstanding the previous general service of William Inglis as heir to the same ancestor.'\*

Sir Alexander Inglis Cochrane appealed.

*Appellant.*—In the law of Scotland there is no ipso jure transmission of rights by mere survivance,—the maxim quod mortuus sasit vivum, being utterly rejected. After the death of a proprietor of lands, the estate remains in hæreditate jacente of the deceased, and the heir entitled to succeed is only an heir-apparent, until he makes a formal additio hæreditatis by service and retour, or by precept of clare constat. The effect of this additio is, that the heir becomes in law eadem persona cum defuncto. Where the rights have been followed by infestment, the service is special: Where the rights have not been followed by, or require no sasine, the service is general; and by it every such right is carried out of the party served to, and is passed to the heir serving. The consequence is, that there cannot be more than one general service to the same individual, for nothing is left to be the subject of a

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\* Lords President, Justice-Clerk, Glenlee, Craigie, and Cringletie, were for Sir Alexander; Lords Balgray, Gillies, Pitmilly, Alloway, Mackenzie, and Medwyn, were for Dr Ramsay. See the Opinions, 6, Shaw and Dunlop, 751.

second general service. Dr Ramsay's service is therefore inept, as the party to whom he was served had been already served to by a previous heir. April 29, 1838.

The respondent endeavours to escape from this conclusion by contending, that, whether there are rights to be carried or not, a general service may be resorted to by heirs in succession, for the purpose of proving their respective propinquity to the deceased. This is inconsistent with the nature and object of the general service. The question put in a general service is not as to propinquity, but as to the right to inherit; although, no doubt, in ascertaining the right to inherit, it may be necessary to inquire as to the propinquity. It may, and often does happen, that the party who served is not so near in blood as another person; but still the party served has his right of inheriting declared, and is retoured as propinquior hæres. Thus a stranger in blood may be called in an entail, yet he will be retoured 'legitimus et propinquior hæres' 'tallia,' &c. No doubt a special service includes a general one, and there may be more than one special service to the same party; but that is only where there has not been infestment taken on the special service; for, to operate as a special service, the jury must inquire who was the party last vest and seized; and therefore the second party serving passes over the person who took the previous special service, but did not follow it out with infestment, and serves to the person last vest and seized. The second special service, however, would not carry the rights which are capable of being taken up by a general service; for these have been taken away already by the general service included in the first special service. The case of Carmichael did not afford termini habiles for deciding the present question, and no judgment was pronounced in it to that effect.

*Respondent.*—The general service was long since introduced to ascertain the character of heir, when a special service could not be resorted to conveniently or with safety to the party serving. Probably, if a plan to accomplish this object had been adopted at a later period, a mere declarator of propinquity would have been preferred; but the minds of men and of Judges were then biassed in favour of the feudal laws and feudal forms. Certain rights followed from this declarator of propinquity, but the primary object of the service was to prove the relationship—the fact from which these legal consequences followed. If the appellant's views are correct, there is no form of process by which the right of blood, a right which may be of the most valuable kind, can be judicially established. Regarding a general service in the above light, it is of

April 20, 1890. no consequence, whether or not the rights of the party served to have been previously taken out of him by an earlier general service, for still the second general service will have the effect of ascertaining the *jus sanguinis*. It does not follow, that because William was served to Alexander, there could not be another heir to Alexander at a later period. No doubt, while William lived, there could not be another service; but William's character of heir to Alexander died with William, and, on his death, could be taken up by the party nearest related. That a nearer heir existed at a former period, and expedite a service to the same ancestor, cannot prevent the inquest from returning an answer to the head of the brieve directing them to say who is now the ancestor's nearest and lawful heir. If the appellant's objection were well founded, it would be applicable equally to special services; but such a proposition was never heard of in conveyancing. If a person has served in special, and dies before completing his title, the next heir does not serve to him, but to the party last infeft; that is, he must serve heir of line to the very same ancestor to whom a service of exactly the same kind was formerly expedite. But as a special service includes a general, there exist in every such case two general services to the same ancestor,—the very combination which the appellant describes as incompetent, and contrary to principle and practice. Accordingly, the competency of such a service was recognized in the case of Carmichael. It is a mere fallacy to say that the respondent ought to serve to William, and that thereby he will prove himself heir of line of Alexander; for there are cases in which a service as heir to the person last serving, will not prove that the party served is heir also to the original ancestor. Thus, if William had a sister by the full blood, and a brother consanguinean, the descendant of the sister would be the heir of line of William, while the descendant of the brother would be the heir of line of Alexander; and although the former would be entitled to serve to William, the latter is as clearly entitled to serve to Alexander.

LORD WYNFORD.—My Lords, This is an action of reduction, which was brought to reduce a general service which had been obtained by the respondent to one Alexander Inglis of Murdieston.—(His Lordship here stated the circumstances of the case, and then proceeded.)—Your Lordships will observe, that the interest to be recovered was an interest in reversion; and that, previous to the service sought to be set aside, one William Inglis had obtained a general service to Alexander Inglis. There are two questions for your Lordships' determination,—first, Whether, after the reversionary interest in the estate was taken out of Alexander Inglis, by the general service which William Inglis

had obtained, the general service obtained by the respondent was valid? April 29. 1830.  
 Secondly, If this second service to the same ancestor could not be supported as a service, whether it might stand as evidence of the propinquity of the respondent's relationship to the creator of the entail?

Upon the first question I have to state to your Lordships, that as this was an estate in reversion, of which there could be no infeftment, all the interest that was in Alexander Inglis passed by the general service to William Inglis. A service to Alexander Inglis, after William Inglis had served heir to him, could have no effect, for there was no estate remaining in Alexander Inglis on which such service could operate. It appears to me, therefore, in principle, that this second service must be a nullity. The Scotch reports do not contain any decided case on this point, but my Lord Stair, in a passage to which I shall presently have occasion to refer your Lordships, mentions a decision which applies directly to it. But there are two Acts of Parliament, and the opinions of three of the most eminent writers on Scotch law, which will assist your Lordships in forming your opinion. By a Scotch statute of the year 1594,\* if a man kills a father or mother, from whom he would have inherited property, he forfeits, by the unnatural murder that he has committed, his inheritance; and two statutes direct, that the next heir shall not serve heir to him. The exception so properly made by this statute, proves the general rule to be the same in Scotland as it is in England; namely, that a claimant to an estate must shew himself to be the heir of the person who was last seized. Now William Inglis, and not Alexander, was the person who, by the operation of the first general service, was last seized of this reversion. The only difference between the law of England and Scotland is, that we have no *hereditas jacens*. The estate with us passes instantly on the death of the ancestor to the heir: In Scotland, a service is required to pass what was left on the death of the ancestor to the heir; but when the estate has been conveyed by the proper service, the rule as to the person from whom a claimant is to derive his title, is the same in both parts of the kingdom. The whole tenor of the statute of entail shews, that a claimant should serve heir to the person in whom the estate was last vested, and not to the creator of the entail, or to any remote ancestor through whom an estate has descended. Lord Stair, B. iii. tit. v. § 25. says, 'The general service of heirs being retoured, doth so establish rights not having infeftment, (as dispositions, heritable bonds, reversions, appraisings, and adjudications in the person of the heirs served), as that no posterior heirs can have a right thereto, unless they be served heirs to the person last served heir, though the right stood in the name of the first acquirer, and not of the last heir;—as an heritable bond or reversion remaining in the name of a father to whom his eldest son was served heir generally, who dying without issue, the second brother

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\* c. 220. or 224.



April 20. 1830. 'must be served heir to his brother, and not to his father, therein.' Lord Bankton, B. iii. tit. v. § 21. says, 'Heritable rights, whereon infestment did not follow, are conveyed by a general service, which fully carries and states the right in the heir's person that was in the deceased, in such manner, that although he die before he perfects the right in his own person by infestment, the next heir must serve to him.' Erskine, B. iii. tit. viii. § 78. says, 'A general service carries to the heir a complete right to all the heritable subjects in which the ancestor had not taken sasine, though he has not established a right to that in his own person by sasine. For, seeing all personal rights are *sua natura* transmissible *inter vivos* by the owner to the grantee by simple assignation without sasine, they must also be effectually transmitted from the deceased to his heir by a service, which is the legal method of conveyance from the dead to the living. From hence it follows, that if the heir thus served should die before he had infest himself in these rights, his heir, if he wants to carry them, must serve heir to the last deceased, because they were last vested in him.' Lord Stair says, that his opinion was founded on that of the Judges in the case of Rollo or Rollock. The case of Carmichael v. Carmichael has been referred to, as a case the judgment in which impugns these authorities. But the Lord President says, in his judgment in the Court below, that this point was not decided in that case. If your Lordships look at the conclusion of the report in that case, you will be of opinion that the Lord President is correct; for all that the Court seem to have decided was, that the party claiming could only take as a trustee for persons who had a better and a more equitable title than himself. It has also been insisted, that the works of Mr Erskine and Lord Bankton contain passages which are inconsistent with those which I have quoted to your Lordships; that the former says, 'A general service is competent to the heir alone, and has no relation to any special subject;' and the latter says, that 'a general service of an heir of line, which bears no reference to any particular subject or right, may take place when nothing is carried thereby.' I cannot discover such an inconsistency between these passages and those to which I before referred, as destroys the authority of the former. But it is not pretended that Lord Stair is chargeable with inconsistency, or met by any authority that impugns his opinion on this question, as to the case relating to a service obtained by a daughter, who, it was afterwards found, had a brother who was the heir. It was an inquiry, how a service of heir by a person who was not heir was to be got rid of, and not as to what is the effect of a service obtained by the person who was heir at the time that such service was obtained. Lord Medwyn, in the Court below, referred to several cases of Peerage, in which there had been services to very remote ancestors. There is no objection to service to a remote ancestor, provided there has been no service to any intermediate ancestor. We have only a very loose note of those cases, and I am not

atisfied that in any one of these cases there had been any previous service. I therefore humbly submit to your Lordships, that the balance of authority proves, that the service sought in this case to be reduced cannot be supported as a legal service. April 29. 1830.

This brings me to the second question, Should this service be permitted to stand as evidence of the propinquity of the relationship of the respondent to the entailer? The passage from Lord Bankton is relied upon as an authority for permitting it to stand for that purpose. All that Lord Bankton says is, that there may be general services although nothing passes,—there may be general services where there is no estate to pass, and then of course nothing can pass. This passage is no authority for showing that such services may be used as evidence of relationship. They are taken out for another purpose, namely, for the purpose of carrying the estate. I do not approve of taking a proceeding for one purpose, and using it for another. The industry of the bar has furnished us with no precedent of a service being used as evidence of relationship. As to the fact of relationship, a service of heir is evidence that is worthy of very little attention. These services are taken *ex parte* before an Under-Sheriff. There is no one present to cross-examine, or in any manner to sift the truth of the evidence on which the heirship is established. Under this unsatisfactory mode of proceeding, a complicated question of fact and law is found. In finding that a party is in that degree of propinquity to be the heir of the entailer, the jury are, under the direction of the Under-Sheriff, to decide on the legality of marriages, as well as the births of children, and the deaths of such persons as stood between the claimant and the deceased. I am sure no Court ought to pay any attention to the finding of a jury on such matters, conducted as the inquiries must be before juries who serve persons as heirs. I will never advise your Lordships to establish for the first time a precedent for serving heirs, for the purpose of making those services evidence in a question of pedigree. It may be said, that this reasoning tends to prove, that the service of a person as heir should in no case be admitted in an inquiry respecting the title to lands. But there must, according to the law of Scotland, be a service of heir to invest a claimant with a character to sue. It must be proved, therefore, that a claimant has been served as heir to the person under whom he claims, in order to shew that he has the character which entitled him to come into Court. It is not for me to say whether it is proper that this form should be continued as a part of the law of Scotland. It will be seen, however, that the inquiry, whether a man is heir to the person who was last served heir, is far less complicated, and much fitter for the tribunal before which it is made, than an inquiry whether a man be the heir of the creator of the entail who has been dead some hundreds of years. The greater number of descents that an estate has passed through, the more links that there are in the chain of pedigree,—the more the difficulty of the inquiry respecting heirship is

April 29. 1830. increased. Not only does the number of links in the chain increase the number of questions to be tried, but makes each question more difficult. The judgment of the Court below was only given by a majority of one Judge; the Lord President and the Lord Justice-Clerk were in the minority. This circumstance relieves me from the embarrassment which I otherwise should have felt when advising your Lordships to reverse the judgment of the Court of Session.

I humbly move your Lordships, that the interlocutor pronounced in the Court below be set aside, and that this case be sent back to the Court of Session, with directions to that Court to reduce the service of heir to Alexander Inglis, which has been obtained by the respondent.

The House of Lords accordingly 'ordered and adjudged, that the interlocutor complained of be reversed; and it is further ordered, that the cause be remitted back to the Court of Session, with instructions to the said Court to reduce the general service.'

*Appellant's Authorities.*—3. Ersk. 8. 36.; 3. Stair, 5. 8. 25.; 4. 35.; 3. Bank. 5. 1. 4. 21.; 3. Ersk. 8. 63. 78. Rollock, July 1636, (1. Brown's Synop. 217.) Duncan, Feb. 9. 1813, (F. C.); 2. Craig, 13. § 47.

*Respondent's Authorities.*—3. Ersk. 8. 63. 65.; 2. Bank. 326.; 3. Stair, 5. 35. 42.; 1503, c. 94. Carmichael, Nov. 15. 1810, (F. C.) Cuninghame, Feb. 27. 1812, (F. C.)

SPOTTISWOODE and ROBERTSON—RICHARDSON and CONNELL,—  
Solicitors.

No. 22.

JAMES THOMSON, Appellant.—*Wetherell—Wilson.*

THOMAS FORRESTER, Respondent.—*Lushington—Dundas.*

*Landlord and Tenant.*—On a question of fact, relative to a tenant's liability for a year's rent, the House of Lords, (affirming the judgment of the Court of Session), held the tenant not to be liable.

June 18. 1830.

2<sup>d</sup> DIVISION.  
Lord Mackenzie.

FORRESTER held a lease of a farm from Balfour of Leys, (whose factor loco tutoris was James Thomson), for nineteen years from Whitsunday and Martinmas 1797. Among the subjects let were a mill and orchards; and from these Forrester was to remove at Whitsunday 1816, but not from the arable lands until the ensuing Michaelmas. Nearly five years after a settlement with Forrester, and his removal from the farm, a claim was made upon him by Thomson for the value of the fruit of the year 1816; and in an action the Sheriff of Perthshire and the Lord Ordinary

decerned against him; but the Court of Session remitted to an accountant to report on the question, how many crops' rent had actually been paid for the orchard and fruit thereof. It appeared from the report, that Forrester had not got the fruit of the orchard crop 1797; and thus, counting crop 1816, only had the number of crops (nineteen) stipulated for by the lease. Evidence was also produced, that a person authorized by Mr Thomson had been paid by Forrester for the crop of 1816. The Court therefore altered, and assolizied Forrester, with expenses. Thomson appealed; but the House of Lords, without requiring the respondent's Counsel to be heard, affirmed the interlocutor, with L. 50 costs.

June 21. 1830.

JAMES CHALMER—SPOTTISWOODE and ROBERTSON,—Solicitors.

WALTER NEWALL and JOHN INMAN, Appellants.  
*Lushington.*

No. 23.

COMMISSIONERS OF POLICE OF DUMFRIES, Respondents.  
*Spankie—Alderson.*

*Public Police—Statute.*—Held, (reversing the judgment of the Court of Session), that a clause in the Police Act of Dumfries, authorizing the Commissioners to remove obstructions, did not warrant them, for the purpose of widening the entrance to a street, to remove a tenement which did not encroach on or obstruct the line of the other houses.

BANK-STREET in the town of Dumfries runs off at right angles from the High-street, and leads to the White-sands, where cattle and other markets are held. At the corner which it forms with the High-street, Newall and Inman had an area on which stood a tenement of houses facing both the High-street and Bank-street. Adjoining to this tenement was a small area or garden, enclosed by a stone wall built in a line with the wall of the tenement, and running along Bank-street. At the opening next the High-street, Bank-street is only fifteen feet wide, but gradually widens as it approaches the cattle-market, where it is above forty feet wide. Newall and Inman's area and tenement did not project into or form any encroachment or irregularity on the street itself; but much inconvenience was occasioned by the narrowness of the entry from the High-street into Bank-street, it being frequently crowded to excess.

June 21. 1830.

2D DIVISION.  
Lord Cringletie.

By the Dumfries Police Statute, Commissioners are empowered to order 'the proprietors of all houses and other buildings 'fronting any of the streets or roads of the said town, encroach-

June 21. 1860. 'ing upon or obstructing the lines of the said streets or roads, 'to remove, or cause to be removed and taken away, within a 'reasonable time, such houses or parts of houses, and all outstairs, 'outshots, buildings, erections, and other things whatsoever, which 'tend to obstruct the free passage of the said streets, roads, 'and foot pavements.' And it is provided, that in case the 'foresaid obstructions shall not be removed by the owners or 'proprietors within three months after the date of the warrant 'ordering them to be removed, it shall be lawful for, and in 'the power of the said Commissioners, to cause the same to be 'instantly removed at the expense of the owner; provided also, 'that in cases where the said houses or parts of houses, outstairs 'or outshots, buildings and erections, shall be removed under the 'authority of this Act, for the purpose of public conveniency and 'accommodation, that the expense and damage arising therefrom 'shall be paid by the Commissioners aforesaid from the funds 'levied by virtue of this Act.' Provisions are then made for ap-  
plication to the Sheriff, and obtaining a verdict of a jury as to the value of the ground and houses; and the Sheriff is author-  
ized, after consignment, or payment, of the money awarded by the jury, to 'ordain the owner or proprietor of such houses or parts 'of houses or areas, on which such encroachments stand, quietly 'to permit and suffer the said Commissioners, or workmen to be 'employed by them, to take down the said houses or parts of houses, 'and encroachments or nuisances, and to convert the same into a 'part of the public streets, for the purpose of sufficiently widen-  
'ing or straightening the same.'

The Commissioners of Police entered into a contract with Newall and Inman, whereby the latter agreed to take down their tenement, and, in rebuilding, to give to the side facing Bank-street six feet nine inches; the value of the ground so given to be fixed by a jury in terms of the Police Act. Newall and Inman accordingly removed the tenement, lined back to the stated extent, began to rebuild, and presented an application to the Sheriff, praying him to summon a jury to fix the value of the ground ceded to the Commissioners. In the mean time, the Commissioners adopted a different view, and demanded additional fifteen inches from Newall and Inman; thus making the space to be ceded, eight feet. This was refused; and the Commissioners presented a petition to the Sheriff, founding on the statute, and praying for an order to summon a jury to value the ground which they proposed to take off the property of Newall and Inman, in order to widen the street. This was opposed on

June 21. 1830.

various grounds by Newall and Inman; but it is unnecessary to detail the procedure, except that it was agreed, in the original application, that Newall and Inman should resume their property, as if the original building had never been taken down, reserving all claims of damages. Thereafter the Sheriff, in respect that he 'has no power to review or controul the proceedings of the pursuers as Commissioners under the statute libelled, and that his only duty in this case is, in obedience to said statute, to follow out the measures thereby prescribed for ensuring to the defenders the value of the property proposed to be taken from them,' granted warrant to summon a jury. Newall and Inman having obtained leave from the Sheriff, presented a bill of advocation, and in the meanwhile proceeded at their own risk to build a tenement within the original march. Lord Mackenzie refused the bill as incompetent, in respect that 'it appears to the Lord Ordinary, that the question cannot be tried in an advocacy of an application to the Sheriff for a jury trial under the statute, but by a direct suspension in this Court, on the ground of alleged excess of power.' Lord Alloway, however, passed a second bill, and issued the subjoined note of his opinion.\* A record having been closed, Lord Cringletie remitted 'to the Sheriff to recall his interlocutor; and in respect that the Commissioners of Police have no power to take any part of the area in question, to dismiss the petition of the said Commissioners; and found them liable in expenses.' His Lordship explained his opinion in the note below.† The Commissioners having reclaimed,

\* NOTE.—The question stirred is, whether the Commissioners of Police under the statute have the power of widening the streets? It is surely doubtful whether they possess this power *ad libitum*, and whether the powers committed to them to remove all houses and other buildings fronting any of the streets or roads of the town, and all outstairs, outshots, buildings, erections, and other things whatsoever, can be construed into a power not only to remove such encroachments from the streets, but to widen the streets where there are no such obstructions, from the line in which they now are, to the line which they conceived to be more fitting and advantageous. The question, therefore, goes to the power of the Commissioners; and if they had no such powers, the application to the Sheriff was incompetent; and any advocacy of the judgment of the Sheriff, especially where leave to advocate was granted, was competent, and even more regular than a suspension, where the decree had not been extracted.

† The Lord Ordinary having heard parties at the bar very fully this day, and since advised the process, sees that he remarked, on advising the revised condescendence for the Commissioners of Police, that they did not dispute the accuracy of the plan in process, whereby their attention to that point was directed before closing the record; and it was closed without the accuracy of it being contradicted. 2dly, In the condescendence as revised, it is not pretended that the house in question is an encroachment on the line of the street. The Commissioners only say that it is an encroachment on Bank-street; and as that street appears to be composed of two lines of

June 21. 1830. the Court altered, advocated the cause, and found ' that the proceedings adopted by the Commissioners, for the purpose of re-

' houses converging together as they form the street, every one of them is as much an encroachment as another. The plan represents the street as it stood before the house belonging to the advocates was pulled down; and as a private bargain between them and the Commissioners, for giving up six feet nine inches of the area on which it stood, and on the faith of which bargain the house was pulled down, was departed from by the Commissioners, the case is to be viewed in the precise same way as if the old house were still standing. On this view, then, the fact is proved by the plan and undictated averments of parties, that Bank-street leads off at right angles from the High-street of Dumfries; that, at the mouth next the High-street, it is only fifteen feet wide; that the tenement in question stands on the right or west side of Bank-street, and immediately adjoining to it is a small area or garden, enclosed with a stone-wall built in a line with the wall of the house next the street; next to that is a house, whose wall next the street is in continuation of the same line, and so on to the south,—so that there is no deviation from, nor encroachment on the line of that west side of the street:—on the east, or opposite side, the line is not so straight; but still it is nearly so, and the two diverge gradually as they are carried south, so as to widen or be distant from each other, twenty-seven feet seven inches. Thus the two sides of the street form the two sides of a frustum, or part of a very acute angled triangle, of which the west side is the more regular of the two, and is, besides, a continuation of the line of another street leading farther south.

' Such being the facts, the Lord Ordinary considers this to be entirely a question—What is the power of the Commissioners to pull down houses? for he doubts not the propriety of widening Bank-street at its junction with the High-street. That may be quite expedient; but if they have not the power, the street must remain as it is; and the Commissioners have themselves to blame, that they did not widen it to the extent of six feet nine inches, which the advocates consented to give them.

' Now, on looking to the Act of Parliament, which is the sole right of the Commissioners, the powers given them are expressed thus:—That it shall be in the power of the Commissioners, after " inspecting the premises, and hearing the parties concerned, " to order the proprietors of all houses and other buildings fronting any of the streets or roads of the said town, encroaching upon, or obstructing the lines of the said streets or roads, to remove, or cause to be removed or taken away, within a reasonable time, such houses, or parts of houses, and all outstairs, outshots, buildings, erections, and other things whatsoever, which tend to obstruct the free passage of the said streets, roads, and foot-pavements," &c. This is the extent of the power given; and in an after-clause it is declared, that after paying for the said houses, or parts of houses, or other obstructions, the Commissioners are " to convert the same into a part of the public streets, for the purpose of sufficiently widening or straightening the same." From the powers thus given, it seems quite clear to the Lord Ordinary, that it was only houses, or parts of houses, encroaching upon or obstructing the lines of the streets, that were to be pulled down; for surely there is no power given to alter these lines. Put the case, that a street shall be a perfect parallelogram, but that the houses are within eight feet of each other, like an Edinburgh close; can it be maintained, that under the statute one side of the street could be pulled down, and the street be widened to twenty or thirty feet? Such an idea was never in contemplation. It was obstructions only, or encroachments on the lines, that were intended to be removed. The line of a street may be circular, or it may be a parallelogram, or con-

' \* ' This is stated in the answers to the condescendence, and not disputed in the revised condescendence, and must be held to be true.'

‘moving the obstructions in that part of Bank-street that enters into the High-street of Dumfries, complained of, were competent under the statute, and remitted to the Sheriff to proceed accordingly; but found no expenses due.’\* June 21. 1830.

Newall and Inman appealed.

*Appellants.*—1. The Commissioners must abide by the arrangement which they entered into with the appellants, or at all events are bound by the agreement, that matters are to be put in statu quo.

2. The statute vests the Commissioners with no power to widen streets by removing houses in the lines of these streets, whether the streets be narrow or not.

*Respondents.*—1. The arrangement between the parties left all matters entire, and cannot affect the present question, which relates to the interpretation of a statute. If the Commissioners had the power, they were bound, in the execution of the trust confided in them, to enforce the statute.

2. In regard to the construction of the statute the object of the Legislature is clear, and its provisions must be interpreted so as to give effect to that object. The purpose of it was to improve the communication between one part of the town and the other, and it is not denied that the tenement forms an obstruction to the intercourse in one of the most crowded quarters of the town.

The LORD CHANCELLOR, after observing that he concurred entirely in the opinion of the Lord Ordinary, moved, and the House of Lords ‘ordered and adjudged, that the interlocutor, so far as ‘complained of, be reversed.’

*Appellants’ Authorities.*—Russell, January 18. 1764, (7353.) Countess of Loudon, May 28. 1793, (7398.) Dawson, February 18. 1809, (F. C.) Heritors of Constopline, March 10. 1812, (F. C.) Young, June 28. 1814, (F. C.) Brown, Feb. 1. 1825; (3. S. & D. 480.)

RICHARDSON and CONNELL—A. GORDON,—Solicitors.

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‘verging; but still, if the line be straight, and not obstructed by salient buildings or encroachments on that line, the Commissioners have no power to touch it: and as the house in question was not an encroachment on the line of Bank-street, but formed a continuation of that line, the Lord Ordinary is of opinion, that they have no right to encroach on its area without the consent of the advocates. When a street is formed by two converging lines, it is impossible to say that any one of the houses is an encroachment; they all tend to narrow it as they are continued, but none is an encroachment on the line. If there be a right to pull down, it must extend to the whole street.’

\* See 6. Shaw and Dunlop, 884.



No. 24.

Colonel MATTHEW MACALLISTER, Appellant.  
*Lushington—Russell.*

Mrs FLORA MACALLISTER, and OTHERS, Respondents.  
*Spankie—Dundas.*

*Res Judicata.*—Circumstances in which it was held, (affirming the judgment of the Court of Session), that a decree pronounced in reference to a question of English law, on the motion of the party challenging it, constituted *res judicata*, although he alleged that he had acted under erroneous information as to the law of England.

June 23. 1890.

1st DIVISION.  
Lord Meadowbank.

THE late Colonel Norman Macallister, Governor of Prince of Wales Island, was lost at sea in autumn 1810, leaving two natural daughters, Flora and Frances. He was proprietor of the estate of Cairnhill or Clachaig in Scotland, to which, in the absence of any deed of settlement, his elder brother, Colonel Matthew Macallister, the appellant, was entitled to succeed. The only deed which he left was a testament in the English form, containing *inter alia* the following bequests:—‘I bequeath to my brother Matthew the sum of L. 5000 sterling during his life, which is afterwards to revert to Flora Macallister, and her male heirs, and, failing them, to Frances Macallister.’ After other conditional provisions in favour of the appellant, the deed contained this clause:—‘I give and bequeath the whole and every part of my landed property and estate of Cairnhill, and any other lands that I may have, to my daughter Frances Macallister, and her lawful male heirs; and failing the said Frances Macallister, and her lawful male heirs, I bequeath the above named estate and lands of Cairnhill to my daughter Flora Macallister, and her lawful male heirs; and failing of them, I bequeath the above named estate and lands of Cairnhill, together with every other part of the property, to my brother Keith Macallister, and his lawful male heirs; and failing of them, I bequeath the above named estate and lands of Cairnhill to my brother Matthew Macallister, and his lawful male heirs; and failing them, I bequeath the estate and lands of Cairnhill to my nephew John Macallister, and his lawful male heirs; which, however, I have now burdened with one hundred pounds sterling a-year, for life, to my sister Peggy. All the rest of my property, with whatever may fall or become due to me, I bequeath to my brother Keith.’ Independent of the above provision, a legacy of L. 15,000 was bequeathed to Frances, and of L. 10,000 to Flora.

The appellant, availing himself of the informality of this deed, made up titles as heir-at-law to the estate of Cairnhill, and also claimed right to the liferent of the L.5000. In consequence of this, an action was raised in 1819, at the instance of the two young ladies, (who were then minors), and of a trustee under the deed, concluding that the appellant should either be ordained to denude of the lands 'in favour of the two ladies, in terms of the destination of the will; or otherwise, in the event that he should be found entitled to refuse to do so, that it ought to be declared that the said Matthew Macallister, his heirs and successors whatsoever, have, by so doing, forfeited and lost all right, title, and interest, in and to the said last will and settlement, codicil, and letter of instructions, or to any legacies, bequests, provisions and destinations, or any clauses of any description conceived, and to all sums of money, estate, and effects whatsoever, heritable or moveable, real or personal, thereby in any way left or conveyed, directly or indirectly, immediately or eventually, to and in favour of him or of his foressaids, in any way, or in any event whatsoever; and that neither he, nor any of his foressaids, can in any event claim the same, or any of them, or take any benefit whatsoever under the said last will and settlement, or letter of instructions relative thereto.' The appellant having resisted these conclusions, the Lord Ordinary appointed the parties 'to make out a joint case, and obtain thereon the opinion of one or more English Counsel on the will of Colonel Macallister, with reference to the second or alternative conclusion of the libel.'

A case was thereupon prepared and transmitted to Mr Chalmer, the appellant's solicitor in London, who, in reference to it, wrote the following letter to the agents of the appellant in Scotland:— 'When we corresponded on this business in 1812, the question was supposed to be attended with some doubt, because of some decisions in Chancery; but I consider it now as quite settled adversely to your client Colonel Macallister, and that it may be laid down as a general rule, that one cannot act adversely to a will or the intention of a testator, by taking, on account of its informality or otherwise, what was meant for another, and at the same time take benefit from another part of the same instrument.' Mr Chalmer then referred to cases decided, and said,— 'I am therefore of opinion, that it is vain for your client to contest the point. Were it my own case, I would not be at the expense of seeing Counsel on it. However, if the client or you think otherwise, I see no objection to the Counsel proposed.' In conse-

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June 23. 1830.

quence of this communication, the appellant alleged that he was induced to lodge the following minute in the process:—‘ Upon the case being debated, the Lord Ordinary was pleased to order the opinion of English Counsel to be taken, whether the defendant, by taking the heritage, had forfeited his right to the provisions in the will. A joint case was accordingly prepared and sent to London; but before it was laid before Counsel, he came to the resolution of allowing the pursuers to take the benefit of the will as to the other provisions, provided they allowed decret to go out, finding that the defender was entitled to take up the estate of Clachaig and others, as described in the summons, and that the same are now absolutely and irredeemably his property. This offer the defender now accordingly makes, but reserves his whole pleas entire, provided the offer is not accepted of.’ In answer to this it was stated, ‘ that the pursuers, two of whom are under age, cannot enter into any agreement, to the effect stated in the minute, whereby a decret should be pronounced, of consent, finding the estate of Clachaig the property of the defender. But the pursuers, without resuming the argument on either alternative of their summons, which they submitted to the Lord Ordinary when the case was debated, are willing that the case should go to avizandum on that debate, so that his Lordship may decide upon the defence as he shall judge right. One thing, however, it is necessary previously to state, viz. that, as mentioned in the minute, a joint case was, in obedience to the Lord Ordinary’s appointment, prepared by the pursuers, who, after communicating it to the defender, and urging to have it laid before English Counsel, desisted from this, upon the understanding that the defender now admitted, that, by the law of England, the forfeiture in question took place upon his entering to the estate; and the pursuers expected an admission to this effect to appear in the minute. If, however, that admission is not there expressly made, the pursuers submit that it is implied from the circumstances there stated, and may be assumed by the Lord Ordinary in framing his decision upon the case.’

On considering this minute, and answers, the Lord Ordinary decerned in favour of the pursuers, in terms of the second or alternative conclusion of the libel, for having it found that the defender, by refusing to denude of the lands of Cairnhill or Clachaig, has forfeited all right and interest to the last will and settlement libelled.’ Against this interlocutor the appellant represented, on the ground that it did not assolzic him from the conclusion to have him ordained to denude of the lands; and, on

hearing parties, the Lord Ordinary assoilzied him from that conclusion, and adhered quoad ultra. June 23. 1830.

The trustee under the deed of settlement having died on the same day on which this judgment was pronounced, and Miss Frances Macallister having been in the meanwhile married, the appellant (with the view of obviating any objection to the judgment in point of form) brought an action of transference against the representatives of the trustee; and at the same time the trustees under the marriage-contract of Frances were sisted as parties; and the decree was then repeated, and afterwards extracted.

Thereafter, in 1822, an action of multiplepounding was brought to settle the rights of the several parties under the deed of settlement, in which claims were lodged by Flora and the representatives of Frances, (who was now dead), for the L.5000 of which the liferent had been provided to the appellant. In regard to these claims, the Lord Ordinary ordered the opinion of English Counsel to be taken; and Messrs Copley, (now Lord Lyndhurst), Shadwell, (now Vice-Chancellor), and Bosanquet, delivered this opinion:—‘ With regard to the liferent devised by the will to Colonel Macallister, we are of opinion that the life interest given to Colonel Matthew Macallister in the L.5000 has not been forfeited by him, by his succession to the real property mentioned in the will. The will does not in express terms raise a case of election; and it is a rule of the English law, that where a will, imperfectly executed, does not in express terms raise a case of election, an heir of law is not put to election merely because he is made a legatee.’

This opinion having been communicated to the appellant, he brought an action of reduction of the decree which had been pronounced in the former action, on the ground, 1. That it had been pronounced in consequence of erroneous information as to the law of England, which it was admitted ought to regulate the question; and, 2. That it was informal, because the action had been brought by minors without the concurrence of any legal guardian; and the circumstance of the trustee under the deed being a party, was not sufficient to obviate this objection.

To this it was answered, 1. That the decree had been pronounced in foro, and in terms of a motion made by the appellant himself, whereby, while he was assoilzied from one of the conclusions, decree was of his own consent pronounced against him in relation to the other; and, 2. That the decree was perfectly formal; and the objection, even if well founded in fact, (which it

June 23. 1830. was not), was irrelevant, because it was competent to the minors alone, and not to the appellant.

The Court, on the report of the Lord Ordinary, assoilzied the defenders; and thereafter, in the process of multiplepoinding, pronounced this judgment:—‘ Find, that the sum of L. 5000 bequeathed to Flora Macallister, subject to the liferent of Colonel Matthew Macallister, is payable in Great Britain in sterling money—the expense of remittance falling upon the residuary legatee: Find, that Colonel Matthew Macallister, having taken the estate of Cairnhill, has forfeited his liferent interest in the said sum of L. 5000, and repel his claim to the said liferent in the present process; and find, that the liferent interest so forfeited by him devolved upon Frances Macallister, during her life, and, after her death, devolved upon, and now belongs to Flora Macallister, and her male heirs; and that so much of the liferent as devolved upon the said Frances Macallister does not fall under the conveyance in her contract of marriage, but is payable to the trustees for her husband and his creditors, subject to the burden or deduction after-mentioned: Find, that the said sum of L. 5000 bears interest at the rate of four per cent per annum, from 15th August 1811, being a year after the testator’s death: Find, that the annuity of L. 100 per annum, provided to the testator’s sister Mrs Margaret Macdonald, and declared to be payable out of the lands of Cairnhill, must now form a preferable claim against, and burden on, the forfeited life interest of the said sum of L. 5000; and is payable to her in Scotland, free of the burden of the expense of remittance, during her natural life, or so long as the forfeited life interest of Colonel Matthew Macallister in the said L. 5000 shall be sufficient to answer said annuity,—beginning the first term’s payment of said annuity on the 15th day of August 1812, for the year immediately preceding: Find, that the burden of the said annuity must be borne by the trustees for the husband of the said Frances Macallister and his creditors, and by the said Flora Macallister and her male heirs, according to their respective interests in the said forfeited liferent interest.’\*

Colonel Matthew Macallister appealed.†

*Appellant.*—It is proved by the opinions of English Counsel,

\* 5. Shaw and Dunlop, 862. 871.

† He having died, the appeal was revived in name of Keith Macallister, Esq. of Bar.

and is not disputed, that the appellant was entitled to the liferent of the L.5000. His claim, therefore, is one which is founded in law and justice, and it is met by a defence which is altogether of a formal nature. It is said, that because a decree has been pronounced, it cannot, agreeably to the forms of the law of Scotland, be opened up. But this is not a rule of universal application, for wherever substantial injustice has been done, arising either from ignorance of facts or other similar circumstances, a decree may be opened up. In the present case, the appellant acted under the influence of erroneous information, and the judgment of the Court was pronounced with reference to that which was founded in error. June 23. 1830.

*Lord Chancellor.*—If a party has not used due diligence, does that give him a right to appeal against the judgment of the Court below?

*Dr Lushington.*—If your Lordship thinks it does not, I need not occupy any more of your time.

*Lord Chancellor.*—If you choose to act upon the opinion of your agent, and not to examine evidence, you cannot say, after the judgment is pronounced, that you have now got evidence which you did not formerly produce. That has been my opinion from the commencement of the argument. I think that, on your own shewing, the judgment must be affirmed.

The House of Lords accordingly (without calling on the respondents' Counsel), 'ordered and adjudged, that the interlocutors 'complained of be affirmed.'

*Appellant's Authorities.*—4. Stair, l. 44.; 4. Mackenzie, 3. l.; 4. Ersk. 3. 3.; 4. Bankton, 7. 22. Miller, Nov. 27. 1801, (12,176.) Malcolm, Nov. 17. 1807, (No. 17. Appendix, Tailzie.) Clark, Nov. 17. 1825; (4. S. & D. 182.) A. v. B. May 19. 1815, (F. C.)

*Respondents' Authorities.*—Kames' Elucid. Art. 28. Dundas, March 9. 1810, (F. C.)

RICHARDSON and CONNELL—SPOTTISWOODE and ROBERTSON,—  
Solicitors.

No. 25. JOHN OUCHTERLONY, Appellant.—*Wetherell—John Miller.*

LORD LYNEDOCH, and WILLIAM M'DONALD, Respondents.  
*Lushington—James Campbell.*

*Trust.*—Six trustees having been appointed under a deed of settlement, and any three declared to be a quorum while so many were alive; and all having accepted; but one having objected to a loan of part of the trust-funds, and declared he would no longer act; and the number having been reduced, including the objector, to three; and he having refused to concur in the discharge required on the loan being repaid;—Held, (affirming the judgment of the Court of Session), that he was bound to concur both in that and in all future proper and necessary acts of administration.

July 7. 1830.

1st Division.  
Lord Eldin.

THE late John Kinloch of Kilry, by a disposition dated the 7th of July 1802, conveyed to Lord Lynedoch, George Dempster of Dunnichen, William M'Donald of St Martins, William M'Donald, junior, of St Martins, and John Ouchterlony of Guynd, and the survivor and survivors of them accepting, and their assignees, as trustees, his whole property, heritable and moveable, (under exceptions), for special purposes; and, inter alia, for investing L. 12,000 in lands to be entailed upon the same series of heirs, and under the same conditions, as contained in his entail of the estate of Kilry. The deed provided, that any three of the persons named as trustees, while so many were alive and had accepted, should be a quorum; and that they should not be answerable for omissions, or obliged to do diligence, but only for their own actual intromissions severally, and that each of them should be liable for his own acts and deeds only, and not for those of the rest. By a subsequent deed of assumption, he appointed Colonel Kinloch, his eldest son and heir of entail, an additional trustee.

All the trustees accepted, and, in execution of the trust, invested L. 8500 of the above L. 12,000 in land as directed. Thereafter, in December 1811, they lent to Colonel Kinloch, then in embarrassed circumstances, L. 1000, upon his and Kinloch of Kinloch's personal bond, taken payable to the trustees. Ouchterlony was ignorant of this transaction, and disapproved of it when it came to his knowledge. In July 1816 the trustees lent Colonel Kinloch, (his affairs having become still more involved), the remaining balance of the L. 12,000 on his personal bond, and a collateral security for the principal, by assignation to a policy of insurance for L. 2500, which he had effected with the Royal Exchange Assurance Company of London. Ouchterlony alleged, that he ob-

jected to it as ineligible, imprudent, and contrary to the directions and intentions of the truster. The other trustees denied that any such remonstrance was made, but admitted, that the loan did not meet his approbation. The loan was completed, and Ouchterlony's name employed in framing the conveyance, in the same way as those of the other trustees. Ouchterlony averred, that he had intimated that he would no more interfere with the administration of the estate, and would in no respect whatever hold himself responsible. July 7. 1830.

Colonel Kinloch died in May 1824, by which time there survived of the trustees only Lord Lynedoch, M'Donald, junior, and Ouchterlony. In order to receive payment from the Assurance Company, the signatures of a quorum of the trustees, namely, of all those three individuals, were required. Ouchterlony refused to concur, because the money had been lent without his concurrence, and with his decided disapprobation, and contrary to the injunctions of the truster.

The other trustees then brought an action against Ouchterlony, concluding *inter alia* that it should be found and declared, that he was not at liberty to withdraw himself, and renounce the management of the trust; but that he was bound to act as trustee along with them, in granting a valid discharge to the Assurance Company for the sum insured, and in recovering payment of the same, and, in general, in the management of the trust-estate, until the affairs should be finally wound up, and brought to a conclusion in terms of the trust-deed.

The Lord Ordinary found and declared, 'that the defender ' John Ouchterlony is not at liberty to withdraw himself and renounce the management of the trust-estate, as one of the trustees appointed by the trust-deed in question executed by the deceased John Kinloch; but that he is bound to act as trustee along with the pursuers, in granting a valid discharge to the corporation of the Royal Exchange Assurance in London for the sum of L. 2500 sterling mentioned in the summons, contained in the policy of insurance by said corporation, and in recovering payment of the same; and, in general, in the management, recovery, and application of the said trust-estate, until the trust-affairs shall be finally wound up and brought to a conclusion in terms of the before-mentioned trust-deed; and also, that the said defender is bound, in the future management of the estate, to act along with the trustees, and to concur with them in all proper and necessary acts of administration.'



July 7. 1830. To this judgment the Court, (Feb. 15. 1827), on advising a reclaiming petition, adhered, with expenses.\*

Ouchterlony appealed.†

*Appellant.*—The loans to Colonel Kinloch were a breach of trust. It was clearly the trustees' duty not to put the funds in peril, or to grant a loan of the trust-estate to one of their own number. The appellant was therefore bound to have dissented; and he did dissent from such an arrangement, declined incurring any responsibility respecting it, and withdrew from a trust conducted on such destructive principles. By the trust-deed he was only bound for intromissions, not omissions, and could only be liable for what he sanctioned; and, at common law, a trustee cannot be compelled to approve of or incur responsibility for improper measures. He was entitled to withdraw altogether from a trust so managed. The office is no doubt voluntary, and need not be accepted unless the party chuses; but it is not on that account indivestible. Not that, by resigning, the party can shake off old responsibilities, but he can avoid assuming new. Besides, there being a quorum without the appellant, his name ought not to have been introduced into the conveyance. The respondents had no right to mix him up with a measure which he regarded as a manifest breach of the duties of the trust, or to force on him a responsibility for what he would not assent to, but could not prevent. In insisting that the character of trustee is indelible, the respondents assert a legal proposition neither supported by principle nor precedent. But if the appellant could demit, then the conclusions of the present action must fall, particularly that which declares that he must, whether he approves or not, concur in acts and deeds of those trustees who will not listen to his counsel, and who disregard the true interests of the trust. The respondents' conduct has involved them in difficulties; but that is their own fault. In truth, however, the remedy is obvious. On proper application, the Court would appoint new trustees, who would execute the trust. The judgments of the Court have no doubt, from time to time, varied on this point; but the Court plainly has the power, and the latest decisions import that the Court would exert it.

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\* 5. Shaw and Dunlop, 358.

† He afterwards concurred in executing the discharge, subject to the appeal.

*Lord Chancellor.*—You are called upon to receive the money, not to lend it out. There are now only three surviving trustees, and the quorum are three. Suppose that the manner of investing the money had not been justifiable, is the dissenting trustee, when the money is to be recovered, not to accept repayment? July 7. 1830.

*Wetherell.*—But observe the true character of the case. The trustees, by their mismanagement, get into a dilemma; and they then sue the faithful trustee to interpose, to enable them to repair the wrong. Would not a Court of Chancery have said, that the trustee acted perfectly right in refusing to concur? No doubt the Court could give redress against the Insurance Company, and the faithful trustee might be obliged judicially to assent; but he would not be bound to mix himself up with what had been done by his co-trustees, or clothe himself with a trust which had been violated from the beginning.

*Lord Chancellor.*—Still the appellant is merely required to accept a payment to the trust-estate: how can that acceptance make him responsible for the loan? The Court of Chancery would compel him to receive the money, and grant a release. The Insurance Company are entitled to a discharge from all the parties. If the appellant had been dissatisfied with his co-trustees, he might have applied to the Court of Session.

*Lushington* (for the respondents).—The appellant has, in point of fact, obeyed the order of the Court. He has actually signed the discharge. How can he be heard against a judgment which he has obeyed?

*Wetherell.*—He only obeyed the order of the Court when he had no choice. Besides, the judgment goes much farther, and obliges him to concur in all future acts of management. At all events, this trustee should be dealt with as favourably as other trustees, who have acted reasonably and to the best of their judgment, and not have been found liable in expenses.

*Lord Chancellor.*—Probably the Court considered this trustee's conduct not reasonable. They held, that even if he regarded the loan imprudent and unjustified, yet he should have thought it right to receive the money back again. There is a very important point raised in this case. If a trustee accepts, and by the death of some of his co-trustees becomes a necessary party to make up the quorum, can he be permitted to retire, whether there was original misconduct on the part of the other trustees or not?

*Respondents.*—The appellant has assumed, that an accepting trustee can retire when he chuses. But this proposition has no

July 7. 1830. sanction from decisions or practice. He accepted, and neither has nor could have resigned. If he had disapproved of the conduct of the other trustees, the Court of Session, if the complaint were well founded, would interfere and direct a wiser management. But instead of adopting this measure, he allowed the loan to proceed; and now, when deaths among his co-trustees make him a necessary party, he refuses to receive the very funds described by him to be in danger. He has no ground to complain of the declaration that he must in future concur in the management, for that concurrence is expressly confined to all proper and necessary acts. This case has been argued as if the administration had been faulty and exposed to challenge; but there is no ground for such an assumption; and, if there were, it makes the appellant's refusal still more inexcusable. If his co-trustees are guilty of malversation, that is the best reason why he should remain true to his duty. It is a mistake to say that there is any authority for holding that the Court of Session would appoint new trustees, in the place of trustees who had accepted, but affected to disapprove of the acts and deeds of their associates. Looking to the unreasonableness of the appellant's opposition, and the pertinacity with which he delayed the repayment of this part of the trust-estate, he was justly burdened with costs.

LORD CHANCELLOR.—This case arises out of a trust-deed and disposition, executed in the year 1802 by John Kinloch of Kilry. By that deed, five trustees named in the instrument are directed to lay out the sum of L.12,000, for certain purposes, upon lands in Forfarshire. The testator afterwards appointed his son and heir of entail, Colonel Kinloch, a co-trustee. The trustees acting under the trust-deed laid out eight thousand pounds and upwards, on lands of the description mentioned in the deed; and afterwards employed L.2400 and odds, not in the purchase of land, but in loans to Colonel Kinloch, the heir of entail and co-trustee. By way of security for one of these loans, Colonel Kinloch insured his life with the Royal Exchange Assurance Company; and he also gave a security for the payment of the premiums. This transaction, when under negotiation, was communicated to Mr Ouchterlony, one of the trustees, who dissented from it, and declared his dissatisfaction with this mode of applying the funds, as being inconsistent with the terms of the deed; and in the course of the correspondence or communication which took place upon that subject, he said he would not act any longer as trustee. Nothing farther took place with respect to this transaction during the lifetime of Colonel Kinloch. But in the year 1824 he died. At this time there were only three trustees living, Mr Ouchterlony, Lord Lynedoch, and Mr M'Donald. By the terms of the trust, any three

July 7. 1830.

of the trustees are declared to be a quorum, while so many were alive and had accepted, but the three must concur in every act; and when application was made to the Insurance Office for the payment of the money, (the insurance having been very properly effected in the names of all the accepting trustees living at the time), the Insurance Office refused to pay the money without a discharge by the three surviving trustees. Mr Ouchterlony was desired to unite in giving this discharge. He refused, and, in consequence of that refusal, this suit was instituted against him, calling upon him to join in the discharge. A judgment of the Court of Session was pronounced against him, giving effect to that demand. From that judgment there has been an appeal to your Lordships' House.

After the judgment was pronounced, and, I believe, pending this appeal, Mr Ouchterlony was advised to sign the discharge. A discharge was accordingly signed, and the money was paid. Still, however, Mr Ouchterlony has a right to your Lordships' judgment, with respect to the validity of the decision in the Court below.

Mr Ouchterlony has stated, that he did not conceive that he would be justified in signing the discharge; that if he did, it would make himself a participator in the original act which he had condemned; that he was not liable by the trust-deed for his omissions, but for his intromissions; and that by signing the discharge and receiving the money, he would be an intromitter, and would be liable if the estate had suffered any thing by this mode of investing the fund. My Lords, I apprehend that these objections were altogether frivolous. In the first place, if the money were misapplied—if it were an improper investment—it was the duty of Mr Ouchterlony, as one of the three surviving trustees, to do every thing in his power for the purpose of recovering the money, that it might be invested more in conformity with the terms of the trust-deed. The signing the discharge would not, under the circumstances in which he was placed, have made him a participator, or at all responsible for the original investment of the money. I conceive, therefore, that the excuse, or reason, which he has assigned for not signing the discharge, is altogether unsustainable.

There is, however, another part of this judgment brought under the consideration of your Lordships' House, which is material. The Court below have not only ordered that the appellant should sign the discharge, but they also declared that he is bound, 'in the future management of the estate, to act along with the trustees, and to concur with them in all proper and necessary acts of administration;' and have decreed accordingly. Now the question is, whether the Court below had authority to make a decree of this description?

My Lords, Mr Ouchterlony had accepted the trust. By the terms of the trust, three of the trustees who lived and had accepted, were necessary to concur in any act, and to give effect to that act. All the trustees, except Mr Ouchterlony and two others, had died. If Mr Ouchterlony, therefore, did not concur in any act, nothing

July 7. 1830. could be done under the trust. According to the decision and opinion of the Court below, he, having once accepted the trust, could not withdraw from it, so as to defeat the object of the trust; and it appears to me that this opinion is confirmed by the law of Scotland. But, according to some suggestions which were stated at the bar, it was conceived that there was no authority to support such a doctrine. On the contrary, it was submitted that there were authorities the other way. But, after diligent examination, I have found nothing in any text writer, or any case, to establish this position. At the bar no passage was quoted—no opinion referred to—no such case was shewn to exist. Therefore I feel it my duty to advise your Lordships to concur in the decision of the Court below, the effect of which is to uphold this trust, and to give effect to it, and to compel the appellant to act in discharge of it, in the manner stated in this decree;—that is, to concur in all lawful and necessary acts, for the purpose of giving effect to the trust to which he was a party, and which he had regularly accepted. Under these circumstances I should humbly advise your Lordships to affirm this decree.

The House of Lords accordingly ‘ordered and adjudged, that ‘the interlocutors complained of be affirmed.’

*Appellant's Authorities.*—Holmes, (2. Cox, 1.) Walker, (3. Swanstoun, 62.) ; Order of House of Lords, May 22. 1799. Marquis of Montrose, Jan. 27. 1688, (14,679.) Aikenhead, June 24. 1703, (14,701.) Watts, Dec. 10. 1792, (14,700.) Campbell, June 26. 1752, (14,703, and 7,440.) King's College of Aberdeen, Jan. 27. 1741; (Elchies, Jurisdiction, No. 21.) Sir Alexander Dick, Jan. 22. 1738, (7446.) Merchant Company of Edinburgh, Aug. 9. 1765, (7448.) Wotherspoon, Dec. 15. 1775, (7450.) M'Dowall, Nov. 20. 1789, (7453.) Carstairs' Trustees, Nov. 28. 1775; (Brown's Synopsis, vol. v. p. 526.) Whitson, May 28. 1825; (4. S. & D. 42.); 1. Merivale, July 6. 1816; 2. Vesey, p. 319; 6. Mad. 123. Montgomerie, (4. Dow, p. 109.)

*Respondents' Authorities.*—1. Bell's Com. p. 31. Stothard, June 30. 1812, (F. C.) 1. Ersk. 7. 25.

SPOTTISWOODE and ROBERTSON—MONCREIFF, WEBSTER and THOMSON,—Solicitors.

No. 26.

EDWARD ERRINTON TURNER, Appellant.—*Wilson.*

GIBB and MACDONALD, Respondents.

*Possession—Proof.*—Circumstances in which (affirming the judgment of the Court of Session) the presumption of property arising from possession was held to be overcome.

July 7. 1830.

1st DIVISION.  
BILL-CHAMBER.  
Lord Newton.

TURNER, who described himself as having for many years been extensively engaged in mercantile concerns, presented a petition

to the Sheriff of Edinburgh, setting forth that he had sent from London, to his own address in Edinburgh, four boxes containing various sorts of yarn, his own property: That the proprietors of the London waggon gave him a receipt for them in his own name; and on their arrival in Edinburgh, he had, in his own name, received a notice that they lay at the carrier's for delivery: That, on applying at the office for delivery, he was informed that they could not be delivered up, in consequence of an attachment or arrestment, at the instance of Gibb and Macdonald, silk manufacturers in Edinburgh, against Messrs Paul, Wathen and Co. of Woodchester in the county of Gloucester, or against Sir Paul Baghott, knight, whose property it was alleged these goods were: That the petitioner was not a partner of that Company, or in any way responsible for them, or under any engagement with them whatever; and that he was ready to depone that the goods were solely and exclusively his own property, and that the said Company, or Sir Paul Baghott, had no right whatever to the goods, or any claim or interest therein; and praying that the arrestments might be withdrawn, and the goods delivered. Gibb and Macdonald answered, that Turner was the clerk or servant of Sir Paul Baghott; that the goods were the property of Sir Paul; that they had large claims of damages against him; that they had arrested them to found a jurisdiction; and that Turner's present claim was a device to withdraw the goods from the jurisdiction of the Court of Session.

In the course of the procedure before the Sheriff, Turner was judicially examined; but he declined to give any information how he became proprietor of the yarns. Thereafter, the Sheriff, 'in respect that the presumption of the goods being the property of the pursuer is very much weakened by the different productions shewn to the pursuer when under judicial examination, and by the manner in which he declined to answer several questions put to him when under examination, found it incumbent on him to condescend on the person from whom he alleges that he purchased the goods in question, and on the manner in which the said goods, according to his allegation, became his property.' Turner, resting on the legal presumption of property arising from possession, declined to condescend, and called on the defenders to make out their case. The Sheriff pronounced the subjoined judgment, refusing the prayer of the petition.\*

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\* ' Finds it admitted by the pursuer in his judicial declaration, that different invoices of goods sent by Paul, Wathen and Company, to the defenders Messrs Gibb and Mac-

July 7. 1830. Turner having unsuccessfully petitioned the Sheriff for leave to present a bill of advocation on juratory caution, and decree for expenses having been extracted, and a charge of horning given, presented a bill of suspension, but which was refused by the Lord Ordinary on the Bills. This judgment Turner brought under review of the Inner-House, but their Lordships adhered.\*

Turner appealed, and repeated his averment that the goods in question were his sole and exclusive property; that the presumption that they were his property arose from his possession; and that the proof of the contrary fact lay on the respondents, but which fact they had not established.

The respondents made no appearance.

LORD CHANCELLOR.—My Lords, In this case, the printed Cases were laid upon your Lordships' table only on one side,—that is to say, on the part of the appellant, and Counsel appeared only on the part of the appellant. I looked in vain, when the case was argued, to ascertain with correctness what were the facts of the case. They were most imperfectly and defectively stated in the printed Case; and as this was an appeal from the Court in Scotland, I conceived that I should not be justified upon the case on one side, namely, on the part of the appellant, and on the arguments urged on the part of the appellant, in recommending to your Lordships to reverse the judgment of the Court below, without looking into the proceedings which are always laid on your Lordships' table—the whole proceedings in the progress of the cause in the Court below. My Lords, I have, since that time, looked into the proceedings in the

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' donald, were written by the pursuer: Finds it instructed, that the letter 25th October 1825, from Paul, Wathen and Company, intimated to the said defenders, they were to send the pursuer as their agent to tender to the defenders the goods required by their last instructions: Finds it also instructed by the pursuer's letters to the defenders, 19th and 21st November 1825, Nos. 18-25. do. 18-26., that the pursuer was, at the date of these letters, acting in Edinburgh as the agent for Paul, Wathen and Company, in their transactions with the said defenders: Finds it admitted by the pursuer in his judicial declaration, that he showed to the said defenders the letter dated No. 16. Seymour Street, November 11. 1825, No. 18-24., as applicable to the goods in question: Finds there is every reason to presume, that the said goods are the goods referred to by Paul, Wathen and Company, in their letter 24th October 1825, No. 18-23.: Therefore, and in respect that the pursuer has not condescended in terms of interlocutor of 10th July last, finds that the goods in question must be held to be the property of Paul, Wathen and Company, and the goods referred to in the above-mentioned letters, 24th October and 11th November 1825: Dismisses the original petition: Finds the pursuer liable in the expenses incurred by the defenders.'

\* 5. Shaw and Dunlop, 358.

Court below, and have read them with attention and care; and it would have been very unfortunate indeed if your Lordships had proceeded to pronounce judgment upon the case as stated in the printed papers on the one side, without an opportunity having been afforded to investigate the real facts of the case. My Lords, the question in this case was, whether or not the appellant was the owner of certain yarn which he had sent down from London to Edinburgh? He had sent it down by the waggon in his own name; he went himself to Edinburgh after it; applied for it at the waggon office, and there he found a stop was put upon it by the defendants. That stop they put upon it on the ground that it was not the property of Turner, but that it was the property of Paul, Wathen and Company, and that Turner was acting as their agent;—that they were creditors of Paul, Wathen and Company. If those facts were made out, there is no doubt they were justified in what they did. Now, clearly, *prima facie*, this was the property of Mr Turner—he had sent the property to Edinburgh to his own address;—he applied at the waggon office—*prima facie*, this property being in his possession, he would be considered the owner of it; but in the progress of the cause Mr Turner was subjected to what, in Scotland, is called a judicial examination, which is in some manner similar to a bill of discovery in this country. My Lords, I have read through that judicial examination, and I have no hesitation in stating, that no jury in this country would have hesitated for a moment as to the effect of it, if it had taken place before them. It is perfectly impossible to read that examination, and not to see that this was not the property of Turner, but that he was acting as the agent of Paul, Wathen and Company. I should advise your Lordships, under these circumstances, to dismiss the appeal.

July 7. 1830.

The House of Lords accordingly ‘ordered and adjudged, that the interlocutors complained of be affirmed.’

MONCREIFF, WEBSTER and THOMSON,—Solicitors.

JOHN MACLELLAN, Appellant.—*Lushington—Russell.*

No. 27.

ALEXANDER NORMAN MACLEOD, Respondent.  
*Brougham—John Campbell.*

*Arbitration*.—1. Held, (affirming the judgment of the Court of Session), that a reference or submission by a landlord and tenant during the currency of a lease, and on the eve of a break, to a third party, as to a deduction of rent, was constituted by a series of letters; that it related to the period of the tenant's possession posterior to the break, and not to the prior years; and therefore, that the decree, which was confined to the posterior years, was good: And, 2. observed, That even although the reference had



embraced both periods, yet, as the tenant was the sole claimant, and decree was given on part of his claim, it was no objection that judgment was not pronounced on the other part; but the case would have been different, if there had been claims on both sides, and judgment given only as to one of the claims.

July 9. 1830.

2D DIVISION.  
Lord Mackenzie.

MACLELLAN took from MacLeod of Harris a lease of the farm of Ensay, for 21 years from Whitsunday 1813, at the rent of L. 250, payable at Martinmas yearly. It was inter alia agreed, that MacLellan should have his option to give up possession of the farm at the term of Whitsunday 1818, on giving six months' previous notice to MacLeod or his factor.

MacLellan entered into possession; but finding the rent too high, and that, during 1815, 1816, and 1817, instead of deriving any profit he was a loser, he proposed to MacLeod that the rent should be reduced, to which, he alleged, MacLeod acceded. On the other hand, MacLeod averred, that although the matter was the subject of consideration, he had not given any such promise. While affairs were in this situation, MacLellan intimated that he would avail himself of the break at Whitsunday 1818. He did not however actually remove. A great deal of correspondence followed, which MacLellan alleged to import a reference to Mr Brown, to award what deduction should be allowed from the rents of the years prior to 1818; whereas MacLeod represented the reference to relate solely to the years during which MacLellan continued to possess after the year 1818. Mr Brown accepted the reference contained in this correspondence; and found, *1st*, 'That at the term of Whitsunday 1818, L. 74 was a fair and proper abatement to be made from the rent of L. 250 sterling then payable from the farm of Ensay, under the lease granted thereof to the said John MacLellan; and therefore, that from that time he falls to be only charged L. 176 of rent, to be levied in terms of the lease, and subject to the other conditions therein mentioned; and, *2dly*, Decerned and ordained the said John MacLellan to make payment to the said Alexander Norman MacLeod of the said reduced rent, in terms of the lease aforesaid.'

MacLellan raised an action of reduction of this decree,\* chiefly on the ground that the award was ultra vires compromissi, as the subject of reference was the amount of the deduction from the rent of the years previous to 1818, and not subsequently. In defence MacLeod contended, that the correspondence clearly shewed that

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\* He averred corrupt partiality in the arbiter; but the facts alleged in support of it, were neither by the Court of Session nor the House of Lords considered of such a description as to affect the award.

the reference related to the years after 1818; and he brought an action against MacLellan for enforcing the award, and payment of the rent. Parties agreed that the points between them should be discussed in the reduction. The Lord Ordinary repelled the reasons of reduction, and assolized MacLeod; 'but without prejudice to the pursuer claiming, either through the award of Mr Brown or otherwise, a reasonable deduction from the rents of the farm of Ensay for the years prior to 1818;' and on MacLellan reclaiming to the Inner-House, their Lordships adhered with expenses.\*

July 9. 1830.

**MacLellan appealed.**

*Appellant.*—MacLeod undertook to give the appellant an abatement from the rent for the years prior to 1818; and the correspondence which passed between the parties proves, that it was as to this period, and not to that subsequent to 1818, that the arbiter was to confine his attention. This award therefore is clearly *ultra vires*. But even if parties had also contemplated the subsequent rents, then the award is null, in not having embraced the whole subject-matter referred. It is a fatal vice in an award, where the arbiter pronounces judgment on the articles claimed on one side, and leaves all those on the other undetermined.

*Respondent.*—The point truly submitted was the deduction for the years after 1818. As to the previous years, although there had been some communing between the parties, the respondent had never agreed to a deduction; nor does it appear from the correspondence, that these previous years were to be taken at all into the consideration of the arbiter. But the respondent has no objection that this point should be decided by arbitration. Indeed the matter is kept open by the judgment complained of. Supposing both periods had truly been submitted to the arbiter, his having given out his award only as to one period does not vitiate the award; for here the claim was all on one side. If the appellant is not protected by the award declaring the amount of the deduction from the subsequent years, then he is liable for the full rent for those years to the expiry of his lease.

**LORD CHANCELLOR.**—My Lords, In this case, a person of the name of MacLellan is appellant, and MacLeod respondent. The facts are very shortly these, as far as it is necessary to state them

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\* G. Shaw and Dunlop, 790.

July 9. 1830. for the purpose of understanding the judgment I am about to submit to your Lordships' consideration :—Mr John MacLellan rented a farm from Mr MacLeod. The farm was situated at Ensay, in the island of Harris. He rented it on a lease dated in 1814, but to commence from Whitsuntide in the year 1813, for a period of twenty-one years, at the rent of L. 250 a-year; and there was a clause in the lease, by which he was empowered, on giving six months' notice, to put an end to the lease at the expiration of five years from the commencement, namely, at Whitsuntide 1818. The years 1815, 1816, and 1817, were what were called bad years in that part of Scotland. During this period, he had more than once personal communication with Mr MacLeod, his landlord, and letters also passed between them, in which he complained of the badness of the seasons, and the high rent he paid, and he submitted that he ought to have some deduction; and it appears that Mr MacLeod was willing that some abatement should be allowed to him, but no distinct agreement was come to between the parties. When the month of November in the year 1817 arrived, it became time for Mr MacLellan to consider whether or not he would avail himself of the clause by which he was empowered to put an end to the lease at Whitsuntide 1818, and accordingly he gave the regular requisite notice; and having given the requisite notice, that led to a further communication between the landlord and the tenant, the respective parties. The result was, that there was a dispute between them; and it was agreed that the subject of the dispute should be referred to a person of the name of Brown—a person expressly selected by Mr MacLellan himself—a person of unimpeachable integrity, as I conceive, and unconnected at the period with the parties. Mr Brown ultimately made his award; but that award was not made until the year 1824; and by that award he directed, that, from Whitsuntide in the year 1818, a reduction of L. 74 a-year should be made from the rent for the remaining period.

Objections on the part of Mr MacLellan have been made to this award. He contended in the first instance, strongly, that Mr Brown had made the award with reference to matters which had not been submitted to him; that he was not authorized to take into consideration the rent from the period of 1818, but that the only point submitted to him was the abatement of the rent for the antecedent period;—that was contended strenuously by Mr MacLellan, and is contended in the papers upon your Lordships' table. It appears to me, however, impossible to come to that conclusion. In order to understand and comprehend what was the intention of the parties, it is necessary to read through the whole of this voluminous correspondence. I have thought it my duty to read every one of these letters, occupying, I think, one hundred pages of the quarto volume now lying before me; and I have reason to believe the Noble Lord\* who was present during

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\* Earl Radnor.

the argument, has also imposed upon himself the same burden. We July 9. 1830.  
 have both come to the same conclusion. It is, in my opinion, perfectly impossible that the proposition contended for by Mr MacLellan can be sustained. I will refer to one or two of the letters and documents, for the purpose of satisfying your Lordships that, at all events, it was intended to refer to the arbitrator the period beyond Whitsuntide 1818. In a letter from Mr MacLellan to Mr Dallas he says,—‘ At the same time, if Mr MacLeod will let me have the farm at a reasonable rent, I will most willingly continue his tenant;’ that is, after the notice had been given for the purpose of terminating the holding. He then says,—‘ I have great confidence in Mr MacLeod that he will deal with me on as liberal terms as he can, consistent with his own interest; and I am, on the other hand, very much disposed to give as high a rent as the place can possibly afford.’ In another letter from Mr MacLellan to Mr Brown, the arbitrator, he says,—‘ I think their relative values at both periods is the safest and best criterion of the rent which the place should now pay.’ Afterwards, in the course of the reference, in another letter to Mr Brown, he says,—‘ I have not submitted any mode of management to the arbiter;—the true question is, what ought to be the rent of the farm of Ensay, under the ordinary management of the country, at the period I resigned the lease?’ And then, the arbitrator having made his award in the manner I have stated, and Mr MacLellan being extremely dissatisfied with the award, and having expressed himself in the strongest terms upon the subject, he states,—‘ The opinion you appear to have formed of the rent at which Ensay should be fixed astonishes me—it must, to dead certainty, be founded in error.’ He never found fault with Mr Brown as having fixed the rent as a rent prospective from Whitsuntide 1818, but found fault with him solely on the ground of the amount of reduction mentioned in the award. It is perfectly clear, therefore, from these letters, and from other letters contained in the correspondence, that at all events the reference was intended to embrace the period prospectively from Whitsuntide 1818; at the same time I am ready to admit, that this correspondence throws some doubt upon the question, whether it was not also intended to embrace the anterior period—an abatement for which was called for by Mr MacLellan. But supposing that to be so, I apprehend this award must, by the law of Scotland, be maintained. According to the law of Scotland, it is not necessary, where there is a general submission to the arbitrator, in order to render his award valid, that it should dispose of the whole matter intended to be submitted to him;—where he disposes of a part of it under such circumstances, the award may be sustained. Where he disposes of a part of it on the one side, and takes no notice of the claim upon the other, under such circumstances, of course, the award would not be valid; but if the question be, during a long series of years, what deduction can the parties have? and the arbitrator decides that he shall have a deduction for a certain part of the period,—I apprehend his having omitted the dis-

July 2. 1830. posal of the deduction in respect to the other period—the claim being all on one side—will not vitiate the award; and I think, therefore, the Court below acted with perfect propriety in sustaining this award, as fixing the rent to be paid from Whitsuntide prospectively, though the arbitrator did not decide what abatement should be made for the anterior period, supposing it appears, on the construction of this voluminous correspondence, that it was intended that point should be submitted to him. And this gentlemen, Mr MacLellan, will not sustain any injury, if the award is sustained without prejudice to any claim he may have in respect of the rent for the anterior period.

My Lords, there was another circumstance involved in this case. Some misconduct was imputed to Mr Brown; but upon reading the letters, and considering the circumstances of the case, I have come to the conclusion, and I believe the Noble Lord entirely agrees with me, that, upon the whole, the facts to which reference has been made were not of such a description as to affect the award. I shall therefore, under these circumstances, humbly submit to your Lordships, that the decision of the Court below ought to be affirmed.

The House of Lords accordingly ‘ordered and adjudged, that ‘the interlocutors complained of be affirmed.’

J. MACQUEEN—MONCREIFF, WEBSTER, and THOMSON,—Solicitors.

No. 28. JOHN MORRISON and Others, Appellants.—*Spankie—Russell.*

JAMES MITCHELL, Respondent.—*Brougham—Wilson.*

*Jurisdiction—Road—Statutes, 33. Geo. III. c. 138; 4. Geo. IV. c. 49.—Question re-mitted for the opinion of all the Judges, Whether, where a party, accused of evading a toll-bar, has been assizeed by the Justices of Peace from a demand for statutory penalties, the Court of Session has jurisdiction, in an advocacy, to find him guilty, and award the penalties.*

July 14. 1830.

2d DIVISION.  
Lord Cringletie.

By the statute 8. Geo. III. cap. 63. constituting the Forth and Clyde Canal Company, they were authorized, besides forming the canal, ‘to do all other matters and things which they shall think ‘necessary and convenient for the making, extending, improving, ‘preserving, completing, and using the said navigation, in pursuance and within the true meaning of this Act.’ A canal was accordingly made between Port Dundas, near Glasgow, and Grangemouth, on the river Forth; and along the banks a towing-path was formed. The Company carried both goods and passengers between these two places.

July 14. 1880.

In 1794, a statute (33. Geo. III. c. 138.) was passed, authorising roads to be made in the county of Stirling, tolls to be levied, and penalties imposed. In particular, it was inter alia enacted, 'That if any person or persons, owning, renting, or occupying any lands or other premises, near to any turnpike which shall be erected in pursuance of this Act, shall knowingly and willingly permit and suffer any person or persons to pass over the same, or through any gate, passage, or way, with any coach, chariot, landau, berlin, calash, chaise, chair, litter, waggon, wain, cart, carriage, horse, ass, mule, or any other sort of carriage or cattle, or shall open any new road without the consent of the Justices of the said county of Stirling, obtained upon an application made to them, convened at their General Quarter Sessions, (which application the said Justices are hereby empowered, authorized, and required, to order to lie upon the table till their next General Quarter Sessions, and then, and not sooner, they are to determine the propriety of opening the said road), whereby the payment of the tolls, duties, or pontage, by this Act laid on and imposed, is or shall be avoided; every such person or persons so offending, and the person or persons riding, or driving, or owning such coach, chariot, landau, berlin, chaise, calash, chair, waggon, wain, cart, carriage, or cattle, or riding, leading, or driving such horse, mule, or ass, and being thereof convicted on the oath or other legal testimony of one or more credible witness or witnesses, before any one or more Justices of the Peace for the said county of Stirling, shall, for every such offence, forfeit and pay to the said trustees, or to their treasurer for the time being, the sum of 20s. sterling; which sum, in case the same be not forthwith paid, shall be levied by distress and sale as aforesaid;' but declaring, 'That no person or persons shall be liable to pay the toll or duty at any turnpike or toll-gate, erected or to be erected on the said roads, for any carriage, horse, or beast, which shall only cross any of the said roads, or shall not pass above one hundred yards thereon.'

In virtue of this statute various roads were formed, and in particular one from Falkirk to Grangemouth, running parallel with the towing-path of the canal; and another from Beancross to Kerse-bridge, which crossed the Falkirk road, and also the towing-path, at a place called Dalgreen, almost at right angles. At the point of junction with the Falkirk road a toll-bar was erected, at which was levied tolls from those travelling between Falkirk and Grangemouth. Of this toll-bar (which was commonly called the Kerse toll) the respondent Mitchell became tacksman in 1821.

July 14. 1830.

For several years prior to this time the Canal Company had been in the practice of carrying passengers, in coaches and other conveyances, along the towing-path between Grangemouth and one of the locks on the canal called Lock No. 16. situated in the immediate neighbourhood of Falkirk,—there being in the intervening space a great many locks. In proceeding from Lock No. 16. to Grangemouth, the passengers were carried, for a short distance, along a road almost perpendicular to the line of the canal, to Falkirk; whence they were re-conveyed to the banks of the canal to a place called Bainsford, and so brought along the towing-path to Grangemouth. On returning from Grangemouth to Lock No. 16. they travelled along the same line. They thus avoided the turnpike-road between Falkirk and Grangemouth, but necessarily crossed the road between Beancross and Kerse-bridge at Dalgreen. No toll had hitherto been exacted; and several persons, and among others the appellants, had established coaches and carts for transporting the passengers and their luggage along the above line, between Lock No. 16. and Grangemouth. One of the appellants was the driver of a coach belonging to the Company; but the horses were his own property, for which the Company paid him hire, and they received the fares. The others were proprietors of their respective coaches and horses; but they all had the sanction of the Company to travel along the towing-path.

Mitchell, the tacksman of the Kerse toll-bar, having insisted on payment of toll, and the appellants having refused payment, he presented a petition to the Justices of the Peace of the Falkirk district, founding on the above statute, and another in 1810 prolonging it, and praying that they should be found liable in the statutory penalties for evasion of the toll-bar. This petition was dismissed, on the ground that Mitchell had no right in his own name to sue for the penalties. He then, with concurrence of the treasurer of the road-trustees, presented another petition, from which the Justices assoilzied the appellants, with expenses,—‘in respect that the Turnpike Act specially exempts from payment of toll, and from all claim for penalty on the ground of evasion, all those who merely cross the turnpike-road, and do not travel more than one hundred yards thereon; and that the pursuers themselves plead that the defenders travelled altogether on the canal bank, and not on the turnpike-road; and therefore that the defenders have been guilty of no evasion subjecting them to the penalties of the statute.’ To this judgment the Quarter Sessions adhered, in respect that it was ‘ad-

‘mitted by the parties, in presence of the Court, that the coaches July 14. 1830.  
 ‘in question, in travelling from Lock No. 16. to Grangemouth,  
 ‘travelled on the canal bank from Bainsford to the latter place,  
 ‘but did not travel on the Kerse turnpike, except in crossing the  
 ‘same where it crosses the canal bank at Dalgreen.’ Of these  
 judgments Mitchell presented a bill of advocacy, on advising  
 which Lord Eldin remitted to the Justices, ‘with instructions to  
 ‘recall their interlocutors against the complainers; to find that  
 ‘all persons who use coaches or other carriages for the purpose of  
 ‘travelling upon the tracking-paths or roads upon the banks of  
 ‘the canal, must be considered as evading the tolls in the true  
 ‘meaning of the statute, and liable to the penalties therein con-  
 ‘tained; to allow the complainers a proof of their allegations, and  
 ‘thereafter to decide according to the rules of justice;’ and found  
 the appellants liable in expenses. The Court afterwards recalled  
 this interlocutor, and passed the bill.\*

After some intermediate procedure in regard to the sisting and  
 withdrawing of the Canal Company and the road-trustees as par-  
 ties, Lord Cringletie reported the cause to the Court on Cases;  
 and their Lordships, on the 7th of July 1827, found the appel-  
 lants ‘guilty of evading the Kerse toll-bar, by driving their  
 ‘coaches and carts along the banks of the canal, and therefore  
 ‘liable to the advocator in the forfeitures and penalties by the  
 ‘statute libelled on;’ and remitted to the Lord Ordinary to ascer-  
 tain the amount thereof, and decern for the same, and found ex-  
 penses due.†

Morrison and others appealed.

When the cause came to be heard at the bar, an objection was  
 stated to the jurisdiction of the Court of Session to pronounce the  
 above interlocutor, it being maintained, that the statute conferred  
 no power on the Court of Session to convict, but only on the  
 Justices; and reference was made to § 108–112. of the General  
 Turnpike Act, 4. Geo. IV. c. 49.

As this point had not been stated in the Court below, the  
 House pronounced this judgment:—‘Inasmuch as a question  
 ‘has been raised at the bar of this House respecting the juris-  
 ‘diction exercised by the Court of Session in this matter, which  
 ‘does not appear to have been discussed or considered by that

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\* Mitchell then brought a separate advocacy of the original process.

† 5. Shaw and Dunlop, p. 909.



July 14. 1830. ‘ Court, it is ordered and adjudged, that the cause be remitted  
 ‘ back to the Second Division of the Court of Session, to con-  
 ‘ sider and state their opinion whether that Court had, by the law  
 ‘ of Scotland, any jurisdiction, upon a bill of advocacy, to find a  
 ‘ defender liable in penalties under the Acts in the pleadings in the  
 ‘ said cause mentioned, or either of them, such defender not being  
 ‘ convicted before a Justice of the Peace; and the said Second  
 ‘ Division of the Court is hereby required to take the opinion of  
 ‘ the Judges of the other Division of the Court, and of the perma-  
 ‘ nent Lords Ordinary, upon this question.’

D. CALDWELL—J. FRASER,—Solicitors.

No. 29.

PAGE KEBLE, Appellant.—*Lushington—Crowder.*

TRUSTEES of the late THOMAS GRAHAM, Respondents.  
*Pemberton—Dundas.*

Et e contra.

*Appeal—Debtor and Creditor.*—1. The House of Lords having found a debtor entitled to ‘deduction of the charge of remittance’ of money from India;—Held, (reversing the judgment of the Court of Session), that under the above finding the debtor was not entitled to deduction of one year’s Indian interest from the debt; and, 2. (affirming the judgment), That although the Court of Session had of consent found the debtor entitled to deduction of property-tax from 1808 till 1813; and the creditor did not appeal, but the debtor appealed the whole cause; and the House of Lords found it deductible only from and after 1813; the debtor could not claim deduction from an earlier period than 1813.

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2d DIVISION.  
 Lord Cringletie.

In the year 1785 the late Page Keble of Calcutta, the father of the appellant, deposited in the hands of Graham, Crommelin, and Moubray, merchants there, certain bonds due to him by the East India Company, for a considerable sum in current rupees. The leading partner of the house was the late Thomas Graham, Esq. who resided in Calcutta, but was possessed of the estate of Kinross in Scotland. Mr Keble died, having appointed Mr Graham to be his executor. In 1803 the appellant (who was the son of Mr Keble) raised an action against Mr Graham, then resident in Calcutta, concluding against him for payment of L. 4768. 8s. 6d., being the amount of the bonds in sterling money, converted at the rate of two shillings the rupee; and for interest at eight per cent, being that stipulated in the bonds, till 1791. (when he alleged the amount should have been paid to him), and

thereafter for twelve per cent, being the ordinary Indian interest from that period till payment. On the dependance of this action Mr Keble raised and executed inhibition against Mr Graham's estates. In the month of March 1808, the Court of Session decerned in terms of the libel, reserving consideration of the rate of interest; and Mr Graham (who in that year returned to Scotland) having appealed, the House of Lords affirmed the judgment on the 10th of November 1813.\*

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On the case coming back to the Court of Session, two questions arose;—1. What rate of interest Mr Graham was liable for, and the period from which it should be calculated? and, 2. What were the deductions to which he was entitled? On the part of Mr Keble, interest was claimed in terms of the conclusions of his summons; while Mr Graham demanded deduction of property-tax from 1803, when the statute imposing it was passed, till its expiration, and also the expense of remittance from India to Britain, which he stated to be one per cent commission, and Indian interest for the period of a twelvemonth. Lord Craigie decerned for a specific sum, including interest at twelve per cent from 1791 till the 11th of November 1813, and with interest at five per cent on this accumulated sum till payment. Mr Graham having reclaimed, the Court on the 8th of March 1816 found, ‘of consent, that on payment the petitioner (Mr Graham) is entitled to deduction of the property-tax from the period of his return from India to the term of Martinmas 1813, when the debt was accumulated, and is also entitled to deduction of the property-tax from the interest of said-accumulated sum from the said term of Martinmas till the same is paid.’

Against these judgments Mr Graham appealed; but no cross appeal was entered by Mr Keble; and Mr Graham having thereafter died, his trustees were sisted as parties in his place. The House of Lords, on the 21st of July 1820, pronounced this judgment:—‘It is declared by the Lords Spiritual and Temporal in Parliament assembled, that the appellant is to be charged with interest at the rates following, viz. with interest at the rate of L. 12 per cent upon the balance of any account which shall appear to have been stated and signed, and which is mentioned in the summons in this action; such interest to be calculated from the date of the account so stated and signed to the 10th of November 1813; and with interest of the several bonds in the proceedings mentioned, at the rate per cent which they respectively bore,

\* See 2. Dow, 17.

July 14. 1890. 'until the times when they were respectively paid and discharged, 'or indorsed away, and value was given for the same; and with 'interest at L. 12 per cent from and after such times respectively 'to the said 10th day of November 1818, when the former appeal 'was dismissed in this House; but that the appellant is to have 'proper and just allowances and deductions made in respect of 'partial payments, if any, which he can instruct to have been 'made, and in respect of interest thereof; and also a deduction 'of the charge of remittance to Great Britain, of the consolidated 'amount of the debt which shall be constituted against him, up 'to the said 10th day of November 1818: And it is further de- 'clared, that the appellant is chargeable with interest at L. 5 per 'cent upon such consolidated amount of debt, from the said 10th 'day of November 1813 until payment thereof; but with a due 'deduction of the property-tax upon the amount of the interest 'of such consolidated amount of debt, so long and at such rates 'as the same were chargeable upon the appellant's property in 'Great Britain: And it is ordered, that, with these declarations, 'the cause be remitted back to the Court of Session in Scotland, 'to do therein as is just and consistent with these declarations.'

When the case returned to the Court of Session, a dispute arose as to the meaning of the judgment;—Mr Graham's trustees contending, 1. That under the words 'deduction of the charge of 'remittance,' they were entitled to credit, not only for one per cent commission, (which was not disputed to be a legitimate charge), but also to usance or interest on the amount of the debt for one year, viz. from the 10th of November 1812 till the 10th of November 1813, being the term of payment in Britain fixed by the judgment; and, 2. That, agreeably to the consent of Mr Keble, and consequent judgment of the Court of Session on the 8th of March 1816, they should be allowed deduction of the property-tax from 1808 till 1813. To this it was answered by Mr Keble, 1. That the words of the judgment of the House of Lords were expressly limited to 'deduction of the charge of remittance,' which must be held to signify the usual commission; and the words could not be extended to embrace an allowance of interest or usance which was not a proper charge of remittance; and, 2. That the consent given in reference to the judgment of the 8th of March 1816 had been given without due authority; and that having been brought under the review of the House of Lords, and they being satisfied that Mr Graham was not lawfully entitled to deduction of property-tax as there found, had restricted that deduction till the period subsequent to November 1813.

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Lord Cringletie, before answer, remitted to Mr Scott Moncrieff, accountant in Edinburgh, 'to report to this Court what in his opinion ought to be allowed as the charge of such remittance.' In the discussion which then took place before the accountant; both parties founded upon a proof in relation to a similar question which had occurred in an action at the instance of Major Ramsay's executors against Mr Graham, but in which the judgment of the Court was pronounced of consent. Mr Moncrieff reported *inter alia* in these terms:—1st, 'It appears from the proof above-mentioned, that it has been the practice for houses of agency in Calcutta to charge a commission of one per cent, in making remittances of money to Great Britain. This charge has been made and admitted, both in the present case and in the parallel case of Ramsay's executors. If, therefore, it is to be held, as maintained by the pursuer, that the House of Lords, in allowing to the defenders a deduction of the charge of remittance, meant to allow nothing more than the commission usually charged for making remittances from India, the accountant has only to report it as his opinion, that a commission of one per cent on the consolidated amount of debt on 10th November 1813, is the deduction to which the defenders are entitled in terms of the above judgment. 2d, It seems established by the proof alluded to, that, in making remittances from Bengal to Great Britain, it is the practice to purchase bills payable in this country twelve months after date, or six months after sight, and that no interest runs on these bills during their currency;' but he 'reported it to the Lord Ordinary as his opinion, that the practice of making remittances from India to Great Britain, by purchasing bills payable twelve months after date, or six months after sight, during which no interest runs on them, does not confer any advantage upon the debtor of the nature of a charge for remittance; and therefore, that the allowance claimed by the defenders of a year's interest of their debt, does not fall within the terms of the deduction to which they are entitled by the judgment of the House of Lords, and on which alone the accountant is called to give his opinion by the Lord Ordinary's interlocutor. The accountant cannot take upon him to say, whether or not a lower rate of commission may not be usually charged by houses of agency in Bengal, in consideration of the above practice of drawing bills at twelve months' date; but he humbly submits his opinion, that one per cent is the usual commission charged upon remittances to this country, and he has not seen any

July 14. 1830. 'reason to hold, that any other charge of remittance should be allowed in the present case.'

Of this report Lord Cringletie approved, and issued the subjoined note of his opinion.\* Mr Graham's trustees having lodged

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\* 'The Lord Ordinary has attentively considered these objections; and, after every view of the case, feels it quite impossible, in consistency with the express words of the judgment of the House of Lords, or even with justice, to allow the claim of deduction of a year's interest of the money. In the first place, it is admitted that the debt was an Indian one, and payable in Calcutta; as a consequence of which, the interest was Indian, and at the rate of 12 per cent, as long as the debt remained unpaid. On the principle of its being an Indian debt, the House of Lords found interest at 12 per cent to be due; but it limited the period to 10th November 1813, after which 5 per cent interest only was declared to be payable, instead of declaring that interest at the rate of 12 per cent should be due as long as the debt should remain unpaid; which is obviously the principle of accounting between the parties, after the point of law is once ascertained, (which was done in this case), that a debtor, by coming from India to Britain, does not liberate himself from the obligation of discharging an obligation contracted in India, or, in other words, of paying the interest due by the law of India, or the terms of his bond granted there, as long as the principal sum remains in his hands. Now, from the dates specified in the state made out by the accountant, it appears, that although the House of Lords limited the payment of interest at the rate of 12 per cent to the 10th November 1813, not a shilling of the principal was paid till 3d February 1816, and then no more than L.2000; the next payment of L. 9000 was on 28th May in that year; and after that the next was a consignment of L. 6000, not however made till 3d June 1818, more than five years after the course of interest at 12 per cent had ceased. Now, the judgment of the House of Lords being on 21st July 1820, it is highly probable, that, taking all this into view, that Right Honourable House allowed no deduction of interest for the period during which the money contained in the Indian bills was not payable, justly thinking that no deduction was due, owing to its being compensated by interest at the rate of 5 per cent being payable only after 10th November 1813, instead of 12 per cent, which the capital should have borne as long as it remained unpaid.

'But, 2dly, The express words of the judgment itself preclude any allowance or deduction of a year's interest, because, immediately after the words 'deduction of the charge of remittance to Great Britain, of the consolidated amount of the debt which shall be constituted against him up to the said 10th day of November 1813,' follow these words: 'And it is declared, that the appellant is chargeable with interest at L. 5 per cent upon such consolidated amount of debt, from the said 10th day of November 1813 until payment thereof, but with a due deduction of the property-tax on the amount of the interest of such consolidated amount,' &c. Deduction is therefore given of the charge of remittance to Great Britain of the fund constituted as on the 10th November 1813, when interest at 12 per cent ceased; but no deduction is specified from the interest, which is declared to be due at 5 per cent only from 10th November until payment of the principal. The very finding of 5 per cent interest only due after 10th November 1813, in a judgment dated July 1820, proves, that the House of Lords considered the debt to be a British debt, payable here after 10th November 1813, as is admitted by the objectors in their replies, p. 20.; and of course, when that interest is declared to be payable as long as the principal remained in the hands of the debtor, or, as the words of the judgment express it, 'until payment thereof,' it is impossible to discount a year's interest on account of remitting the money from India.'

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a representation, his Lordship ordered it to be answered, and explained his views in the note printed below.\* On resuming consideration of the cause, his Lordship pronounced this interlocutor:—‘ The Lord Ordinary having advised this representation, with the answers thereto, and whole procedure, is satisfied that it is the mere expense of the remittance of the money to Britain that is allowed by the House of Lords, and that the Right Honourable House having found that continuous interest is due by the representers at the rate of 5 per cent from 10th November 1813, it is not competent to disallow any part thereof under the expense of remittance; therefore on that point refuses this representation.’

Against these interlocutors Mr Graham's trustees reclaimed to the Inner-House, who, after ordering condescendence and

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\* ‘ The Lord Ordinary has had money in loan in India, and knows that when it was paid it was sent to him by a bill, whereby he lost a year's interest. The Lord Ordinary does not see how the remitting the money can be of any advantage to the debtor: He pays it to the banker, who gives the bill for it, after which he has no power of using the money; and by thus paying it, he is liberated from paying interest any longer to his creditor. Now, in this case, the Lord Ordinary came to be Judge of this cause just when its last issues were to be tried, and he feels greatly the difficulties occurring in it from his unacquaintance with the particular circumstances of the former parts of it, decided both here and by the House of Lords. He sees, that the 10th of November 1813 has been fixed by both Courts as the period at which Indian interest is to cease and British interest is begun to be due; and this, notwithstanding that the principal debt appears to have been then nearly all outstanding due. The Lord Ordinary wishes to know on what principle this was done. His difficulty lies here. If Indian interest had continued to be exigible till the money was paid in India, that is, till the date of a bill for it, payable a year after date, then it is clear that the debtor would have been relieved of interest of any kind thereafter. But interest at five per cent has been declared to commence on 10th November 1813, the very instant when Indian interest ceased, and consequently the debtor continues to pay interest uninterruptedly until the principal debt should be paid. What, therefore, at present appears to the Lord Ordinary to be the justice of the case is, that the debtor ought to be relieved of a year's interest at 5 per cent of the consolidated fund on 10th November 1813, either from that day till the 10th November 1814, or at least from the date of such remittance for a year, at 5 per cent, because that is the rate of interest which he is found liable to pay; and, if he pays interest for that year, he bears the expense of remittance, which the House of Lords have expressly found him entitled to deduct. The Lord Ordinary is inclined to doubt the solidity of his own reasoning in his note prefixed to the interlocutor complained of, beginning with the words ‘ But, secondly,’ which contains the idea that the terms of the judgment of the House of Lords excluded any allowance of interest. That judgment certainly finds Mr Graham's estate liable for interest continuously; but it also finds it entitled to deduction, from the consolidated fund, of the charge of remittance to Great Britain of that fund,—and the deduction of interest is only a mode of calculating or estimating that charge. All these doubts may however be removed, by an explanation of the anterior proceedings above alluded to, and otherwise explaining to the Lord Ordinary that his present ideas are erroneous.’

July 14. 1890. answers, and memorials, pronounced this judgment:—Find, 'that, under a just interpretation of the judgment of the House of Lords, the petitioners are entitled; under the terms 'the charge of remittance,' to a deduction of the actual costs, by 'loss of interest or otherwise, attending the making the remittances of the consolidated debt from India to Great Britain; and to that extent recall the interlocutors of the Lord Ordinary complained of; but, before answer as to the amount of the said charge of remittance, allow the respondent to put in a special condescendence, in terms of the Act of Sederunt, of what he avers and offers to prove as to the said remittances from India to this country.'

Mr Keble then contended, that as the sum specified in the summons had been converted at a time when the rupee was worth only 2s., and as it had increased in value in 1812 and 1813 to 2s. 6d., he was entitled to set off that increased value against the claim of interest made on behalf of Mr Graham. To this it was answered, that this was truly an attempt to amend the libel, which could not be done without opening up the final judgments of the Court and of the House of Lords, which was incompetent.

The Court, on the 23d of November 1827, pronounced this judgment:—'The Lords having advised this condescendence, with answers thereto, and resumed consideration of the petition for the defenders of date the 4th February 1823, and proceedings relative to the charge of remittance from India to Great Britain of the consolidated amount of the debt as at 10th November 1813, repel the plea of the pursuer founded on the alleged profit arising from an advance in the value of a rupee: Find, that the defenders are entitled to a deduction, as at said 10th November 1813, of one year's interest of the consolidated amount of the debt, at the rate of 12 per cent, as part of the charge of remittance; and to that extent alter the interlocutors of the Lord Ordinary complained of, and remit to his Lordship to proceed accordingly.\* The Lord Ordinary thereafter applied these judgments, and the Court adhered.

Mr Keble appealed as to the deduction of interest; and Mr Graham's trustees cross-appealed in regard to the question of property-tax.

*Appellant.*—1. In applying the judgment of this House, the Court of Session act ministerially, and therefore are not entitled,

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\* 6. Shaw and Dunlop, 119.

from any motives of supposed justice or expediency, to enlarge the intent or sense of the judgment. In the present case they have done so. The words of the judgment are, that Mr Graham is to be allowed 'a deduction of the charge of remittance;' an expression which can only refer to the usual charge, which it is admitted on all hands is a certain commission; whereas the Court of Session have, in addition to this, allowed deduction of a year's interest at the rate of 12 per cent. If it had been the intention of this House to allow such a deduction, it would have been so stated; but so far from that being the intention, the House pronounced judgment specifically on the question of interest, and did not find Mr Graham entitled to that which the Court of Session have, not only without any authority, but in opposition to the judgment, allowed him. Besides, in point of justice, Mr Graham had no claim to such a deduction. It was his duty to have paid the debt when due, and he having committed a breach of obligation, and compelled his creditor to sue him in a Court of law, is not entitled to make profit by retention of the interest. At all events, if interest be deducible, it should only be at the rate of 5 and not 12 per cent.

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2. In regard to the question of property-tax, the judgment of the House is quite explicit. It declares that Mr Graham is to be entitled to 'deduction of the property-tax, upon the amount 'of the interest of such consolidated amount of debt.' But the interest of the consolidated debt is declared by the judgment not to commence till the 10th of November 1813; so that it is impossible to construe the judgment as allowing deduction of property-tax from interest prior to that period. It is true, that by the interlocutor of the Court of Session on the 8th of March 1816, Mr Graham was found entitled to deduction of the tax on the interest from 1808 to 1813; but that judgment proceeded on an erroneous consent, and being brought under review of this House, was rectified according to the justice of the case.

*Respondents.*—1. The true meaning of the judgment of the House in 1820 was, to allow to Mr Graham deduction of the loss or expense sustained in sending the money from India to Britain; and with that view they made use of the comprehensive term 'the charge of remittance,' and sent back the case to the Court of Session, to inquire what was embraced under the term 'charge.' It is not disputed in point of fact, and it is proved by the report of the accountant, that in remitting money from India to Britain there is a loss of one year's interest on the amount. If



July 14. 1880. the money were sent in specie or in goods, the interest would unquestionably be lost during the period of transmission, and in addition there would be charges for freight, insurance, &c. In such a case the respondents would certainly have been entitled, under the terms of the judgment, to have deducted the charge for freight and insurance as well as of commission; which clearly shows that it cannot be restricted in the manner contended for by the appellant. But since the introduction of bills into commerce, all those charges (which would have been payable on sending the money in specie or goods) have been classified under a general head termed 'usage;' and agreeably to which a per centage, corresponding to the rate of interest at the place of transmission, and for a specific period, according to the relative distances of the two places, has been allowed to be deducted as a proper charge. In the present case, that deduction is 12 per cent for the period of one year. Unless, therefore, this charge be allowed to the respondents, they will be losers to that amount, because it is a mistake to suppose that profit could be made by their remitting the money. Neither is there any ground in point of justice why this loss should be imposed upon them. The debt was payable in India, where the debtor was resident; and it is clear that if the appellant had raised his action there, Mr Graham would have discharged himself by paying the money in that country. It was only by the accidental circumstance of possessing heritable property in Scotland that he was liable to the jurisdiction of the Court of Session; and as the appellant called upon him to make payment, not in India but in Scotland, the appellant must sustain the expense of remitting the money from the one country to the other.

2. The claim of deduction of property-tax, which the respondents originally made in the Court of Session, was from 1808, when the statute was passed, till its expiration. From 1803 till 1808 Mr Graham was in India, and the Court had, in consequence of that circumstance, difficulty in finding it deductible during that period. But the appellant himself was satisfied, that, from Mr Graham's return to Scotland in 1808, it was a legitimate charge; and therefore he consented, and the Court found, that it was to be deducted posterior to that period. It is true that Mr Graham appealed against that judgment; but he did so only in so far as it was adverse to him, and certainly not in so far as it was in his favour. It was with reference to the period from 1803 till 1808 that he complained; and as there was no cross-appeal, it cannot be supposed that the House would reverse part of a

judgment which was not submitted to their review, but which, July 14. 1830.  
on the contrary, was acquiesced in by both parties. Although at first sight the judgment appears susceptible of the construction contended for by the appellant, yet its true meaning is, that, in addition to the finding of the Court of Session, (which confined the deduction from 1806 to the 11th of November 1813), it was to be allowed posterior to that latter period, and so long as property-tax was exigible.

The LORD CHANCELLOR, after having stated the facts of the case, proceeded:—The principle of the declaration appears to be this, that these bonds, being Indian bonds, deposited in India, and having been misapplied by the house in Calcutta, the debt was to be considered as an Indian debt, bearing Indian interest up to the time when the judgment of the Court below was finally affirmed in this House. At that period, the interest, at the rate of 12 per cent, was to be added to the principal, and was to create, as it were, a judgment debt. Upon this judgment debt, so consolidated of the principal and interest, interest at the rate of five per cent was to be paid by the defender. That was the principle of your Lordships' declaration. The cause went down again, for the purpose of making the calculations and deductions directed by your Lordships; and it has again come here on two points, to which I am about to call your Lordships' attention.—One point is, with respect to the charge of remittance. Your Lordships will find, that in this case there was to be 'a deduction of the charge of remittance to Great Britain, of the consolidated amount of the debt constituted against the defendant, up to the said 10th day of November 1813;' and the question is as to the meaning of this declaration, as far as relates to the deduction for the charge of remittance. My Lords, I conceive that the true interpretation of the judgment of your Lordships' House was, that this case was to be considered as if the money had remained in India up to the period of November 1813, when the judgment of your Lordships' House, affirming the judgment of the Court below, was pronounced. It was to bear Indian interest up to that time. The defender was to be liable for Indian interest, and the plaintiff was to have the benefit of Indian interest. It seems to have occurred to your Lordships, that as the money was thus to be considered as in India, a deduction should be made in respect of the charge of remitting it to England; and I think the meaning of the declaration is, that the charge should be estimated as it would have existed in November 1813, the period at which the Indian interest was to terminate. Now, my Lords, with respect to the charge of remitting the money from India to England, there is a regular charge of one per cent for commission; but it is stated, that, in addition to this charge of one per cent commission, it is usual to draw bills payable a year from the date, and that this is to be considered as part of the

July 14. 1830. charge of remittance. My Lords, it appears to me, that the consideration of the period which bills so drawn have to run, must of necessity be taken into account at the rate of exchange; and that the true mode of estimating the charge of remittance is to ascertain, whether, by the purchase of bills, the loss by the interest was compensated by the rate of exchange. Now, it appears by the evidence in this cause, if we are to have reference to the period of November 1813. or, indeed, if we are to have reference to any period within five or six years of that time, that the rate of exchange was such, that, considering the question in this way, no loss whatever could be sustained in the transmission of the money in the shape of bills of that description; and it appears to me, under these circumstances, that no deduction ought to be made in respect of the interest;—and, my Lords, the appellant can have no right to complain of this, as it appears that the original debt was calculated at the price of two shillings for the rupee. This appears to me to be the true interpretation of your Lordships' declaration, that the party should be placed in the same situation as if this money had continued in India during the whole period, when, by the judgment of this House, it is to bear Indian interest, and that then it should be remitted to this country at the charge of the party on whose account that remittance was to be made.—My Lords, the next point for your Lordships' consideration respects the deduction for property-tax. It appears, that, by an interlocutor pronounced in 1816, an order was made, by consent, that the property-tax should be deducted from the year 1808; but against that interlocutor there was an appeal to your Lordships' House. The appellant was dissatisfied with that interlocutor, and that subject was taken into your Lordships' consideration at the time the declaration was made to which I have referred. Now, my Lords, the question with respect to the property-tax will depend entirely on the construction of the declaration. It was not competent for the Court below to go out of the declaration; and the question is, What is the fair import and construction of the declaration? The declaration is, 'that the appellant is chargeable with ' interest at L.5 per cent upon such consolidated amount of debt, from ' the said 10th day of November 1813 until payment thereof; but with ' a due deduction of the property-tax upon the amount of the interest ' of such consolidated amount of debt, so long and at such rates as the ' same were chargeable upon the appellant's property in Great Britain.' Nothing can be more precise than the language of that declaration. It refers to the consolidated amount of the principal and interest, and it is payable from the month of November in the year 1813; and the only deduction to be made, according to the language of this declaration, and which appears to me to have been intended to embrace the whole question, is a deduction of property-tax from that period up to the time when the property-tax should cease to have operation. It appears to me, therefore, that, as far as relates to this part of the case, the decision of the Court of Session was perfectly correct, and ought

affirmed. I should propose to your Lordships, therefore, that July 14. 1830.  
 ver part of the decision of the Court of Session should be re-  
 and that this part of the decision of the Court of Session should  
 ed.

House of Lords pronounced this judgment:—‘ It is de-  
 that the respondents are not entitled to a deduction, as at  
 1 of November 1813, of one year’s interest of the consoli-  
 mount of the debt, at the rate of 12 per cent, as part of  
 ‘ the charge of remittance of such consolidated amount of debt to  
 ‘ Great Britain; and it is therefore ordered and adjudged, that  
 ‘ so much of the interlocutor complained of in the said original  
 ‘ appeal as is inconsistent with the above declaration be reversed;  
 ‘ and it is farther ordered and adjudged, that the said cross-appeal  
 ‘ be dismissed, and the interlocutors complained of be affirmed:  
 ‘ And it is farther ordered, that the cause be remitted back to the  
 ‘ Court of Session, to do therein as may be just and consistent  
 ‘ with the said declaration and this judgment.’

*Appellant’s Authority.*—Campbell, Feb. 15. 1809, (F. C.)

*Respondents’ Authorities.*—Rees’ Encyclopædia, voce Usance; 1. Kelly’s Cambist, 22. 29.

RICHARDSON and CONNELL—SPOTTISWOODE and ROBERTSON,—  
 Solicitors.

NATHANIEL STEVENSON, Appellant.—*Spankie*—A. McNeill. No. 30.

MICHAEL ROWAND, Respondent.—*Knight*—Hunter.

*Reparation—Agent and Client.*—Held, (affirming the judgment of the Court of Ses-  
 sion), that a law agent, employed to prepare a security over a land estate, having in-  
 serted an obligation in the bond to infest a me, and neglected to get it and the sasine  
 confirmed, whereby the security became unavailing, was liable in reparation to the  
 client.

THE respondent, Mr Rowand, having got himself involved July 14. 1830.  
 in pecuniary obligations to the extent of about L. 1000 for Mr  
 Campbell of Lochend, entered into an arrangement, by which, 2D DIVISION.  
 with a view to his relief, an apparent loan to the above amount Lord Cringletie.  
 was to be made by a Mr Wardrope to Mr Campbell, who was to  
 grant an heritable bond over his estate in favour of Mr War-  
 drope, and he again was to assign this bond to Rowand. The  
 appellant, Mr Stevenson, a writer in Glasgow, was employed by  
 Rowand to carry this transaction into effect, by preparing and

July 14. 1830. getting executed the heritable security. After some correspondence with Mr Campbell's agent, (Mr Martin, who resided in Edinburgh, and who was at the same time making a separate loan to Mr Campbell), in the course of which he offered to send the title-deeds to Mr Stevenson, but which that gentleman did not require, an heritable bond was prepared by Mr Stevenson, in which he inserted the following obligation by Mr Campbell, viz. 'To infest and seise the said Henry Wardrope and his foresaids, on our own expenses, in the lands and others above disposed, to be holden from me of and under my immediate lawful superiors thereof, in the same manner as I hold the same myself, and for payment of the same feu-duties as I pay, or am bound to pay therefor.' This was followed by procuratory of resignation, and precept of sasine, for infesting Mr Wardrope and his assignees, in terms of the above obligation. The bond was executed by Mr Campbell, and sasine taken thereon at one and the same time with infestment on a bond for the loan by Mr Martin. An assignation by Mr Wardrope in favour of Mr Rowand was then executed, and the deeds were thereupon delivered by Mr Stevenson to Mr Rowand, who retired the obligations for which he was bound on account of Mr Campbell, and remitted to him a small balance in cash.

About three years thereafter, two other parties lent money to Mr Campbell on the security of his lands; and he having become bankrupt, and his estates being sequestrated, it was found, that if Mr Rowand's security was effectual, the lands were insufficient for the payment of these subsequent lenders. In the meanwhile, no confirmation had been obtained of the bond and sasine held by Mr Rowand; and the validity of his security, as in competition with the subsequent lenders, was on this ground challenged. The trustee on the sequestrated estate consulted Mr Professor Bell, who gave this opinion:—'I cannot hold the obligation to infest, as expressed in this deed, to be conclusive in characterizing as a public infestment only a seisin which has been taken on an indefinite precept, granted, as the bond bears, 'to the end that the said H. Wardrope may be immediately infest.' I take this precept to be perfectly sufficient as a warrant for an immediate base infestment, and that therefore Mr Wardrope's security is unexceptionable.' The question having been then brought before the Court, the Lords President and Balgray delivered opinions to the same effect, while Lord Hermand differed from them. But, after advising petition and answers, and a hearing in presence, Lord Hermand came to be of the opinion of

Lords President and Balgray, while these Judges arrived at the July 14. 1830. opinion which had been originally formed by his Lordship; and, in consequence, Mr Rowand's security was postponed to that of the other lenders.

The estate being insufficient to pay any part of the debt, Mr Rowand raised an action of relief, both of the debt and of the expenses he had incurred in the competition, against Mr Stevenson, on the ground that it was his duty, as a professional conveyancer, to have prepared a security unexceptionable in point of form.

In defence Mr Stevenson stated,—1. That the title was strictly correct in form; and that although the Court had arrived at the conclusion that a confirmation was necessary, yet he had not been employed to prepare such a deed, and he had apprised Mr Rowand that it would be prudent to have the title rendered complete, but he had declined to have this done. And, 2. That the deeds had been prepared under circumstances of much urgency and haste, occasioned by the anxiety of Mr Rowand, who was desirous in a concealed manner to have them prepared and executed. And, 3. That as the question had been attended with great difficulty, (as appeared from the conflicting opinions of the Judges), he ought not to be made liable.

To this it was answered,—1. That he had been employed, and had undertaken to obtain a security over the lands, effectual according to the forms of the law of Scotland; that in order to accomplish this, a confirmation was as much necessary as a sasine; that there could be no doubt that if he had neglected to take sasine he must have been liable; and it was not true that he had ever represented that any thing farther than what he had done was requisite to render the title complete. 2. That the statements as to urgency and haste were not correct; and at all events, as Mr Stevenson had undertaken to give a security valid in form, this could afford no relevant defence: and, 3. That the only difficulty which had existed arose from Mr Stevenson deviating from ordinary style, and introducing, in place of the usual obligation to infest a me vel de me, an obligation of a peculiar kind; and although he had thus created a difference of opinion among the Judges as to the effect of such a novel clause, he could not on that account be relieved of his professional responsibility.

Lord Cringletie, after issuing the subjoined note,\* and hearing parties, reported the question to the Court on Informations.

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\* The Lord Ordinary certainly thinks that the manner in which the bond was prepared, in obliging the disponent to infest the dispositive, holding only of the disponent's superiors, was very ill judged. If he entertained a doubt whether he could make

July 14, 1890. On advising them, their Lordships allowed Mr Stevenson to put in a condescence of what he alleged, and his mode of proof as to what took place between him and Mr Rowand in relation to the confirmation; and thereafter, considering the condescence irrelevant, decerned in terms of the libel, with expenses. He then offered to refer to the oath of Mr Rowand, not that he had recommended him to obtain confirmation, but to take infestment on the assignation; and the Court, holding this to be irrelevant, refused to sustain the reference.\*

Mr Stevenson appealed, and endeavoured to draw a distinction between this case and that of Struthers, (ante, II. 563.)

**LORD CHANCELLOR.**—My Lords, There is a case which was argued a short time ago at your Lordships' bar, in which Mr Stevenson was the appellant and Mr Rowand the respondent. The general nature of the case was of this description. Mr Rowand employed Mr Stevenson, who was a writer, a professional gentleman, to lay out for him a sum of L. 1000, to be lent to Mr Campbell at Lochend, on the security of land which was his property. Mr Stevenson lent the money, prepared the instruments, and handed these instruments over to Mr Rowand, his employer. Some time afterwards, Sir John Campbell, and Captain Patrick Campbell, lent farther sums of money to Mr Campbell, which was secured on the same property; and afterwards, Mr Campbell falling into difficulties, sequestration was issued against him. The property became vested in the hands of trustees, and the value of the property being much deteriorated, and not being equal to the payment of all the debts, the parties began to consider their respective rights; and Sir John Campbell and Captain Patrick Campbell, on the investigation which took place, were led to conclude, that the security Mr Stevenson had effected for Mr Rowand on this property had been inaccurately completed, and that, therefore, his priority was at an end, and that they would have a preference in ranking on this estate. In consequence of this, certain proceedings took place in the Court in Scotland; and the Court ultimately decided in favour of the claimants, Sir John Campbell and Captain Patrick Campbell, as against Mr Rowand, in consequence of which Mr Rowand lost his security; and Mr Rowand has instituted the present proceeding for the purpose of recovering compensation against Mr Stevenson,

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\* that obligation to include the holding of and under Mr Campbell, it was his duty to have put the question to Mr Martin, who would have solved the doubt. But the Lord Ordinary does not see there could be any reason for doubting the competency of a base infestment in an ordinary landed estate. At present it appears to the Lord Ordinary, that it was the defender's bounden duty to have expressly told Mr Rowand, that his title and security was not complete till he obtained a charter of confirmation from Mr Campbell's superior. But the Lord Ordinary will hear parties on this.

\* 5. Shaw and Dunlop, 903. ; 6. Shaw and Dunlop, 272.

the professional gentleman employed, on account of the losses he had July 14, 1830. thus sustained.

This, my Lords, is an outline of the case. The question turned upon the nature and the form of the security. According to the law of Scotland, all real property is supposed to be held of some superior. The instrument in this case, which was an instrument for the purpose of effecting the security, was an heritable bond, and the terms of the obligation were these :—‘ The property so disposed in security is declared in the said bond to be holden a me in manner following ; to be holden from me, of and under my immediate lawful superiors thereof, in the same manner as I hold the same myself, and for payment of the same feu-duties as I pay or am bound to pay ;’ so that it appears by the terms of this obligation, that the property disposed in security was to be holden from him under the superior lord. This obligation was followed by the ordinary procuratory of resignation, and by an instrument of sasine in general terms, not pointing out the manner in which the property was to be holden under that instrument of sasine. Mr Wardrope, in whose name the money was lent, who was a partner with Mr Rowand, and in whose name the security was to be taken, was infeft, and the instrument of sasine was in the ordinary way entered on record. It appears, therefore, under these circumstances, according to these instruments, that the property was to be holden of the superior lord ; and that the infeftment under that general instrument of sasine was an infeftment by which Mr Wardrope, who may be considered in this case as representing Mr Rowand, was to hold the property of the superior lord.

But, my Lords, in order to complete such a security, it was necessary there should be a charter of confirmation from the superior lord in order to give efficacy to the infeftment ; for the infeftment was without warrant so far as the superior lord was concerned, and it appears that no application whatever was made by Mr Stevenson for the purpose of procuring this charter of confirmation. According to the ordinary mode in which conveyances of this kind are executed, the terms of the obligation are, ‘ to be holden a me vel de me.’ If the obligation had been in these terms, then the infeftment would have operated as a valid infeftment to constitute a base holding, which, as to third persons, would have been operative, whatever might have been the effect of it with reference to the superior lord.

When the case came into the Court below, in the contest between Mr Rowand on the one side, and Sir John Campbell and Captain Patrick Campbell on the other, it was contended on the part of Mr Rowand, that as the instrument of sasine was in general terms, and as it proceeded from Mr Campbell, it created at all events a base holding. On this ground the case was argued in the Court below. The Court was at first divided in opinion ; and it was not until after consideration, and much discussion, that they came to the opinion, that, looking to the terms of the obligation, the holding was to be con-



July 14. 1890. sidered a holding of the superior lord, and that therefore it was defective, inasmuch as there was no charter of confirmation. They considered, and I think properly considered, that as the instrument of sasine was in general terms, it must be construed in reference to the terms of the obligation; and as the terms of the obligation pointed out a holding under the superior lord, and under the superior lord only, that construction must be put upon the instrument of sasine; and that the infeftment must be considered an infeftment under the superior lord, and not being confirmed, and there being no warrant from him, it must be held to be defective.

My Lords, I beg to state, that the construction put by the Court of Session on this instrument is, in my opinion, the right construction. But in this case it is argued, and fairly argued, that that was a nice point—a point on which the Judges of the Court of Session were divided for a considerable time; that they did not come to a conclusion upon it until after much consideration; that Counsel of eminence at the bar had entertained an opinion that the security was valid; and that therefore it would be extremely hard that Mr Stevenson should be made answerable for such a mistake. My Lords, I apprehend the rule to be this, that a solicitor called upon to perform duties in his character as a solicitor, is not to be held responsible for every mistake in point of law which he may commit. Every person is liable to error, to mistakes in difficult and doubtful points of law; and if the question had turned solely on the construction of this instrument, I should be of opinion that Mr Stevenson was not liable. But, my Lords, the true distinction is this:—In this particular case, it appears that Mr Stevenson, without any sufficient reason, departed from the ordinary and beaten course, from the usual and established forms of conveyancing. The usual and established form of conveyancing in cases of this nature is, that the holding should be in the form I have stated—that the property should be disposed to be held *a me vel de me*. If the instrument had been drawn in that form, there would have been no question in the case. But if Mr Stevenson, either from inadvertence or from want of knowledge, chose to depart from the usual form, and to adopt another, raising unnecessarily a nice and difficult question, he must take the consequences upon himself. Had he turned out to be right, indeed, all would have been well; but having, from inadvertence or negligence, and without necessity, raised this question, it appears to me that he is responsible in point of law for the consequences of this act. Under these circumstances, I should recommend to your Lordships to confirm the judgment which the Court of Session have in this case pronounced, declaring that Mr Stevenson is liable to make good the loss sustained by Mr Rowand in consequence of his act.

I will take notice of two points which have been insisted upon by Mr Stevenson in his defence. It was stated at the bar that he was not in possession of the title-deeds, and that therefore he could not

see whether subinfeudation was or was not prohibited ; that this might have been prohibited, and there might have been a clause of irritancy. Now, without considering, and it is not necessary for the present inquiry to consider, what would have been the effect of such a prohibition, for it is unnecessary for the determination of the present case, it is sufficient to state, that it appears that Mr Martin, who acted as agent of Mr Campbell, the borrower of the money, was in possession of the title-deeds, and offered the inspection of those title-deeds to Mr Stevenson. He had an opportunity, therefore, of examining them if he had thought proper to apply for them ; and not having examined the title-deeds, he cannot rest his defence on the possibility of any supposed clauses, or any supposed prohibitions, contained in these title-deeds.

My Lords, it has been again stated, that at the time when these deeds were delivered by Mr Stevenson to Mr Rowand, he stated to him in distinct terms that they were not complete,—that they required confirmation,—and that he afterwards, I believe on more than one occasion, called to the recollection of Mr Rowand that the conveyance was not perfect, and that something further was required to be done. My Lords, in looking into the evidence, and considering the whole of the case in this respect, it appears to me that that part of the case admits of no doubt—that it is perfectly clear what was intended between the parties at the time. It does not appear that Mr Stevenson represented to Mr Rowand, that it was necessary that a confirmation should be obtained from the superior for the making the title good in Mr Wardrope ; but that, as the money was lent in Mr Wardrope's name, and the security was taken to Mr Wardrope, preparations were made for transferring the title from Mr Wardrope to Mr Rowand, and, until this were done, Mr Rowand's title was not complete. I am quite satisfied on looking into the documents, and I was quite satisfied from what I heard at the bar, that when it was stated that a communication had been made by Mr Stevenson to Mr Rowand that the title was not complete until something further was done, that such statement related not to the confirmation of the title by the superior lord, but to the conveyance by Mr Wardrope to Mr Rowand ; about which Mr Rowand was not at all solicitous, because Mr Wardrope was his partner, and he was perfectly satisfied of the solvency of Mr Wardrope. This is an explanation which is quite satisfactory to my mind, as far as it relates to that part of the case. Your Lordships perceive, therefore, that, as I before stated, a nice and technical point of law was without necessity raised by the neglect or the want of knowledge of Mr Stevenson ; that in consequence of that circumstance Mr Rowand has lost his security ; and I apprehend, under these circumstances, Mr Rowand is entitled to recover from Mr Stevenson the loss he has sustained.—I feel myself, therefore, called upon to recommend to your Lordships to affirm the decision of the Court below.

July 14. 1830. The House of Lords accordingly 'ordered and adjudged, that  
' the interlocutors complained of be affirmed.'

*Appellant's Authorities.*—(3.)—M'Lean, Nov. 15. 1805, (No. 2. App. Reparation);  
4. Burrow's Reports, 260.; 3. Campbell's Reports, 17. Grant, Jan. 1. 1791;  
(Bell's Cases, 319.)

*Respondent's Authorities.*—(1.)—Ogilvie, Nov. 17. 1680, (13,956.) Drummond, Nov.  
10. 1680, (13,958.) Scott, Jan. 3. 1696, (Ib.) Johnston, Dec. 8. 1709, (13,959.)  
Wood, Nov. 28. 1710, (13,960.) Robertson, July 27. 1725, (13,963.) Rae,  
July 29. 1741, (Ib.) Goldie, Jan. 4. 1757, (13,965.) Mason, Feb. 14. 1787,  
(13,967.) Lillie, Dec. 13. 1816, (F. C.); aff. May 25. 1819. Duguid, July 3.  
1817, (F. C.) Currie, June 17. 1823, (2. S. & D. 407.) Struthers, Feb. 2.  
1826, (4. S. & D. 418.); aff. May 28. 1827, (ante, II. 563.)

RICHARDSON and CONNELL—MONCREIFF, WEBSTER and  
THOMSON,—Solicitors.

No. 31. JAMES M'GAVIN, (Trustee on JOHN STEWART and Company's  
Estate), Appellant.—*Lushington—Hunter.*

JAMES STEWART, Respondent.—*Keay—Jarvis—Shaw.*

*Process—Proof.*—1. Circumstances in which it was held, (reversing the judgment of the  
Court of Session), that a question, whether a Company had been dissolved and goods  
sold to a partner or not, should be submitted to a jury, and the parties examined  
before the Jury Court, notwithstanding that the dissolution had been publicly adver-  
tised, and the invoices and bills of lading set forth that the goods were the property  
of the partner.

2. *Pactum Illicitum.*—Question raised, whether a commercial transaction between parties  
in Great Britain and America, pending war, or on the eve of war between these  
countries, was pactum illicitum?

July 14. 1830.  
1st DIVISION.  
Lords Gillies and  
Meadowbank.

In 1803 the respondent, James Stewart, entered into partner-  
ship with his brother John, and James White, as manufacturers of  
cotton goods in Paisley, under the firm of James and John Stew-  
art and Company. He had previously been in the United States  
of America, and soon thereafter returned to that country. The  
Company shipped goods to him there for their joint behoof,—the  
invoices stating them to have been shipped by the Company  
'on account of Mr James Stewart, merchant there.' During  
his residence in that country, he obtained the privilege of an  
American citizen, with the view, as he stated, to the protection  
of his person in the event of war taking place with Britain, which  
was threatened in consequence of the Orders in Council. Al-  
though the invoices were expressed in the above terms, the bills  
of lading granted by the masters of the ships frequently bore,

that the goods were the property of the respondent alone; and July 14, 1830. he was described as an American citizen. This, he alleged, was allowed to be introduced by his partners in Scotland, for the purpose of more effectually protecting the insurers against capture by French vessels; the insurances on the goods being made against all risks, and this country being at that time at war with France, while France was at peace with America.

He returned to Scotland in 1807, when a missive of partnership regulating the rights of the parties was executed; and in the course of the same year he again went to the United States, where he remained till April 1809, when, in consequence of the Non-intercourse Act, (which had the effect to exclude all British goods, to whomsoever belonging, from the American market), he returned to Scotland. He remained in this country till July 1812, during which period the commercial operations of the house were, as he alleged, greatly embarrassed by the exclusion from the American market. The goods which they had on hand, he stated, were, from their nature, rapidly depreciating in value, and it appeared probable, unless means could be obtained of converting them into money, that the Company must announce an insolvency.

At this period the political relations of America and Britain stood in a peculiar situation. The Non-intercourse Act was still in force, and indications of war very strong, while, on the other hand, the American Government had announced, that so soon as the Orders in Council were recalled, the Non-intercourse Act would be withdrawn. Proceedings had taken place in Parliament with a view to the recall of these orders, and they were recalled on the 23d of June 1812. Under these circumstances, the respondent stated, that an arrangement was made between him and his partners, by which it was agreed that the Company should be dissolved, but that the public announcement of the dissolution should not be made till after the debts had been paid off;—that he should purchase the stock of the Company and carry it to America, (for which market it had been manufactured);—that it was his intention, if he found, on arriving on the coast of the United States, that the Non-intercourse Act was still in force, (which applied equally to American and British subjects), to proceed to the British port of Halifax, and there await the announcement of the recall of the Orders in Council, and consequent withdrawal of the Non-intercourse Act; and that, on the other hand, if he found that the Act had ceased to be in operation, but that war had taken place, he would land in the United States, as his rights of a citizen entitled him to do, and there dispose of his property.

July 14. 1830. In entering into this arrangement, he stated, that the leading object of all parties was the payment of the debts of the Company, for which he was to make remittances from America; but that the goods were bona fide sold to him, and the whole risk of loss was imposed upon him, while, if there was profit, it was to belong to him exclusively.

The invoices, which were delivered and subscribed by the Company, bore, that the goods were 'on the proper account and risk of Mr James Stewart, merchant, New York,' and the bills of lading were expressed in the same terms. The policies of insurance were taken subject to a qualification, that the insurer should not be liable in the event of American capture; an exemption from liability which the respondent alleged was introduced because the goods were his property, and that, as he was an American citizen, he would be entitled to vindicate them. Previous to his departure, the books of the Company were balanced.

On his arrival on the coast of the United States, he found that the Non-intercourse Act was still in operation, and that war had been declared. The crew of the ship (which was American) refused to proceed to Halifax; and the goods on board of her were seized, under the Non-intercourse Act, by an American revenue cutter. Subsequent shipments were made by the Company; the invoices and bills of lading bearing, that the goods were shipped on the proper account and risk of the respondent. These goods were captured by an American vessel as prize of war, on the allegation that they were truly the property of British subjects, and so liable (independent of the Non-intercourse Act) to capture. After certain judicial proceedings in the Courts of America, (in the course of which the respondent made oath that the goods were truly his property), and after granting bond for their value in the event of it being discovered that they belonged to British subjects, he made sales, sent remittances of part of the proceeds to the Company, and required the public announcement of the dissolution. His partners in Scotland accordingly advertised in the Gazette, and in the local newspapers, that 'James Stewart ceased to be a partner of J. and J. Stewart and Company, merchants and manufacturers in Paisley, on the 2d of July 1812.'

After disposing of all the goods, and remitting the proceeds to his former partners, to be held, as he alleged, (after deduction of the debts of the Company prior to the date of the dissolution), for his behoof, he returned to Scotland in 1814. The Company (which now assumed the firm of John Stewart and Company) then rendered him an account, in which they debited themselves

with a balance as due to him of L. 2492. At a subsequent period, July 14, 1830. however, they made a claim against him for a share of the profits on the goods which had been shipped to him in 1812, and which they alleged belonged to the old Company. He thereupon raised an action against John Stewart and Company, and John Stewart and James White, the partners, before the Sheriff of Renfrewshire, for payment of the admitted balance, which was met by the above defence. The Sheriff sustained the defence, and assolizied; whereupon the respondent brought an advocacy to the Court of Session.

In the meanwhile, the estates of John Stewart and Company had been sequestrated under the Bankrupt Act, and the appellant, M'Gavin, was appointed trustee. In this character he brought an action of count and reckoning against the respondent, before the Court of Session, in which, after libelling on the missive of partnership, he set forth the grounds of his action as follows:—‘ That, in terms of this agreement, the pursuers and the said James Stewart carried on business as partners and copartners in trade, under the aforesaid firm of James and John Stewart and Company; and, in order the better to manage the said business, the said James Stewart, as had been originally provided for in the said agreement, went to America, to conduct the concerns of the Company, as often as circumstances required. That in the month of July 1812, when the said James Stewart was going to America, and during the period that he was there, subsequent to that date, and down till the month of February 1814, the said James and John Stewart and Company consigned to the said James Stewart various parcels of goods, for the purpose of his disposing of the same, as one of the partners of the said Company, and for the general behoof of the concern. That to enable the said James Stewart to dispose of the said goods, and to secure the same against seizure and otherwise, in the course of the year 1807 he obtained himself entered as a citizen of the United States; and it became necessary that the said James and John Stewart and Company, of which concern the said James Stewart was one of the individual partners as aforesaid, should make out the invoices in the name of the said James Stewart, as the purchaser from the said James and John Stewart and Company. That in the month of July 1812 the Non-intercourse Act between America and Great Britain was in force, and the greatest caution and prudence was necessary on the part of British merchants, as well to secure the property which they had in that country, as to carry on the business in which they had previously been engaged. That the said James Stewart, defender, was fully aware of the

July 14, 1812. ' delicacy and danger which attended an open communication with  
' the pursuers, his partners; and therefore, during the period subsequent to the month of July 1812, while he remained in America  
' managing the concerns of the Company, he cautiously observed,  
' and enjoined the pursuers, his partners, to observe the greatest  
' secrecy in their concerns, and to obey his instructions in conducting the business of the Company, and holding him ostensibly  
' and publicly as the purchaser of the goods shipped by the said  
' Company, and to regard and consider him as a citizen of the  
' United States, and to hold out that he was noways connected  
' with the said Company; (of which he was, nevertheless, a  
' partner, and had been sent to the United States for the sole purposes of executing and managing the affairs of the said Company  
' in that quarter). That, with the view of more effectually securing the property of the said James and John Stewart and  
' Company, and for the better security in carrying on the said business in future, the said James Stewart directed, that the pursuers,  
' as his partners in the foreshaid concern, should insert in the Edinburgh Gazette an advertisement or notice importing a dissolution  
' of the said Company, and to forward to him copies of the said  
' Gazette, to the effect, and exclusively for the purpose of more  
' easily securing the property of the said Company, which had  
' been captured as belonging to a British subject, and of affording  
' a protection to any continuation of the consignment of goods by  
' the pursuers as his partners; to the end that the goods might be  
' brought to a safe and advantageous market, for the behoof of the  
' Company. That, in compliance with the directions of the said  
' James Stewart, the pursuers followed his instructions, from a  
' conviction on their part that they were furthering their own interest, as well as that of the defender himself; and they accordingly inserted the following notice in the Edinburgh Gazette:—  
' (the advertisement was then quoted.) That the defender, the  
' said James Stewart, did not subscribe this advertisement; but  
' the said John Stewart adhibited the name ' James Stewart' to  
' it, in compliance with his advice and desire, and for the sole  
' purpose of fulfilling the object and intention so anxiously recommended by him, in order to save the goods, or to redeem certain bonds that might have been granted for the relief and delivery thereof. That this notice was inserted in terms of the  
' request of the said James Stewart, and exclusively for the special purposes aforesaid; but the pursuers, nevertheless, kept their  
' books, and carried on the business of the said concern, in the  
' same name, and under the same firm of James and John Stewart

'and Company, in terms of, and agreeable to the original missive of July 14, 1830, agreement before quoted. That the whole business was conducted by the pursuers from and in the belief and conviction, on their part, that the said James Stewart was to receive a rateable and full proportion of the profits of the said concern, agreeable to the share which he held in the Company's business, notwithstanding these acts and deeds; and they held and believed, that they were entitled to, and would be furnished with, the accompts. of sales of the goods of the Company so sent to him, and to receive their proportionable share of the profits and proceeds of such sales.'

In defence the respondent stated,—1. That the goods had been bona fide sold to him, and the Company dissolved; and in support of this he founded (independent of other evidence) upon the terms of the invoices and bills of lading as conclusive in his favour, unless redargued by his writ or oath; and, 2. That, assuming the allegations set forth in the summons to be true, (but which he pointedly denied), he maintained, that the Court could not sustain such a summons, because it set forth a contract or agreement to carry on trade by secret and fraudulent means during war, which was contrary to the public policy and law of the country.

Lord Gillies in the advocacy remitted simpliciter; but thereafter recalled this interlocutor, and granted diligence for recovery of writs in both actions. After a great deal of procedure, Lord Meadowbank (who succeeded Lord Gillies) repelled the defences, and ordained the respondent to lodge an account of the proceeds of the goods. Against this judgment the respondent reclaimed to the Inner-House; and their Lordships found, 'that in the event of the petitioner (James Stewart) being found ultimately liable to account for any part of the goods sent to America, the pursuers are bound to guarantee him against any bonds which he may have granted, or responsibility which he may have incurred, to the American Government, as captors, for the value of the goods now claimed by the pursuers;' and remitted to an accountant to investigate the books, and report. The accountant having reported in favour of the respondent, the Court, after ordering condescendences by the parties, and advising them, altered, and in the action of count and reckoning assolized the respondent; and in the advocacy decerned in terms of the libel, and found him entitled to expenses in both actions.\*

M'Gavin appealed.

\* 6. Shaw and Dunlop, 738.—In the meanwhile, both John Stewart and James White had died.



July 14. 1830.

*Appellant.*—There are two questions of fact on which the parties are at issue:—1. Whether the Company was dissolved in July 1812? and, 2. Whether the goods shipped to America were the property of the respondent or of the Company? Both of these questions ought to have been submitted to a jury, whereas the Court of Session have assumed the functions of that tribunal, and allowed their judgment to be regulated by the opinion of an accountant. But if the evidence be inquired into it will appear, from the documents in process, that although *ex facie* there was a dissolution, and the goods were ostensibly the property of the respondent, yet this was merely assumed in consequence of existing political circumstances; and, in point of fact, there was no dissolution till 1814, the goods belonged to the Company, and on that footing remittances were made to them by the respondent.

The pleas which he has maintained in defence are both unjust and unfounded. He pleads, that the transactions were of an illegal character, and therefore, (while it is thus conceded that the goods belonged to the Company), founding on his own turpitude, he attempts to withhold the profits. But in truth the transactions were not illegal; for although the goods were shipped in Scotland posterior to the declaration of war by America, yet the existence of that declaration was not then known in Britain. Besides, the respondent himself landed the goods in the United States after he was aware of the declaration of war, although it had been arranged that in that event they should be carried to Halifax; and therefore he cannot maintain his present plea. Neither is his other defence better founded. He says, that he is entitled to the privileges and character of a trustee, or at least that the trust must be established by his writ or oath. If this were correct, then no commercial transactions between consigner and consignees could safely be carried on. But the documents existing anterior to those in question shew, that the latter were mere simulate papers. It was by means of such documents that the greater part of the commerce of Britain was transacted during the war.

*Respondent.*—1. The pleas imputed to the respondent are entirely misrepresented. He does not plead, that in point of fact the transaction was of an illegal nature. On the contrary, his defence is, that it was a legal transaction—the goods having been bona fide sold to him before he sailed from Scotland. His preliminary plea is rested entirely on the terms of the *summons* of the appellant. It is there set forth, that an arrangement was entered into between

the parties to carry on trade between this country and America, during a period when hostilities were in existence; that the documents were conceived in the terms in which they are expressed, to defeat the public policy of the country; and that this was to be accomplished by means of fraud on the British Government, and by perjury on the part of the respondent. The question, therefore, which he submitted for the judgment of the Court of Session, and submits to this House, is, whether, assuming the allegations in the summons to be true, (but which he has pointedly denied), such an action can be maintained in a Court of law? He does not, therefore, plead his own turpitude, because his preliminary defence rests entirely on the mode in which the appellant has thought fit to libel his summons.

His other defence is equally misrepresented. He does not maintain that he is a trustee. On the contrary, he avers that the goods were actually sold to him, and in evidence of this he refers to the bills of sale or invoices, which form the proper writ of the Company, and which prove that they sold the goods to him. To elide the effect of these documents, the appellant alleges that the respondent held the goods in trust; so that the averment that he is a trustee is that of the appellant, and not of the respondent. His answer to this allegation is a denial of the fact, and a reference to the statute 1696, c. 5. by which it is enacted, that an allegation of this nature can only be established by writ or oath,—a rule which was enforced in regard to bills of lading, in the case of *Wilson v. Keay*, 26th February 1787.

Neither is this a case which required to be submitted to a jury; for where there are written documents which can only be overcome by the writ or oath of party, it never has been the practice of the Court of Session, nor does the statute require that such a case should be sent for trial by jury. The investigation in the Court below was properly confined to an inquiry into the books of the parties; and it is customary in such cases to avail themselves of the assistance of an accountant.

2. But in truth neither the Company nor the appellant have any proper title or interest to insist in this action; and at all events they are bound, ante omnia, to relieve the respondent of any claim under the bonds granted to the American Government. It is not true that the goods were placed within the power of that Government by the act of the respondent, or that it was arranged that he was to carry them to Halifax in the event of war. He made a provision with the insurers for liberty to go to Halifax; but this was with reference to the possibility of the Non-intercourse Act.

July 14. 1836.

July 14. 1830. peared to have cleared out from some neutral port. In policies of insurance upon such ships, power was expressly given to use these simulated papers. If these were allowable to enable us to continue our trade during war, the setting up the pretence that goods admitted into the enemy's country before the war began, are the property of subjects of that country, to prevent the seizure of such goods, is justifiable. But it has been said, that the respondent must have perjured himself to protect those goods, if the interest in the firm had not been fully conveyed to him; for he was obliged to swear that these goods were his property, and that no British subject had any interest in them. He might have evaded the necessity of taking any such oath, if, when he arrived on the coast of America, and found that there was war between that country and this, he had taken the goods to Halifax. Importing the goods into the United States was an act of his own, with which his partners did not interfere. His partners in Scotland did not know, that by the law and practice of America the respondent had placed himself in a situation in which it would be necessary for him to take such an oath. His partners in Scotland did not assent to his taking this oath, nor were they privy to his taking it. The perjury is all the respondent's own. The appellant is not a *particeps criminis*, and the respondent cannot defeat the appellant by any allegation of his own turpitude. If I had seen a scintilla of proof that the appellant directly or indirectly countenanced the respondent's taking an oath which the appellant knew to be false, I would not advise your Lordships to give him any assistance: although the allowing simulate papers always leads to the commission of perjury, and although I am afraid actions were maintained where perjury had been committed, I will never consent to sanction perjury, even when it is had recourse to in order to deceive the enemies of the country.

Another objection, not more entitled to your Lordships' favourable consideration than the last, has been taken by the respondent, namely, that the respondent is a trustee, and that he has not declared, either in writing or on oath, for whom he is a trustee. If this objection were to prevail, it would destroy the import trade of Scotland. Upon bills of lading it generally appears as if the goods actually belonged to the consignee, although they are to be held by him on account of some other person. If the true owner could not get goods, or the proceeds of goods, out of the hands of a consignee, to whom they are sent under a bill of lading in the form that is used all over Europe, who would send his goods to a Scotch market? But there is, besides the bill of lading, an invoice, which is sent with the goods, and under which the consignee takes the goods. Now, it appears from the invoices in this case, that the goods were not on account of the consignee solely, but on account of the firm to which both these parties belonged. These two papers must be taken together; and then it clearly appears, in a writing which came to the respondent with the goods, to whom these goods belong. This paper is in the handwriting of one of the partners.

All the partners are agents for each other. This writing, therefore, July 14. 1830. takes the case out of the statute relative to trusts. But this statute has nothing to do with such a case: There is no trust created by the bill of lading: It is a simple deposit of the goods. On whose account that deposit is made, is to be ascertained by looking at the invoice.

The last question is a question of fact. Did the partnership, which it is admitted once existed between these parties, terminate in 1812 or 1814?—(Lord Wynford here gave reasons why he thought that this question ought to be submitted to a Jury, before whom the parties should be examined; but as his observations on this part of the case was applied to matters of fact only, we have not reported them.)—His Lordship concluded by moving, That the judgment be reversed;—that the case be remitted to the Court of Session in Scotland, with a direction to submit it to a Special Jury;—and with a direction that the parties in this cause should be examined before such Jury.

The House of Lords accordingly ordered and adjudged, ‘that the interlocutors complained of be reversed: And it is farther ordered, that the cause be remitted back to the Court of Session, with directions to submit the question of facts to a Special Jury, and that it be an instruction to the Jury Court to examine the parties viva voce before them.’\*

*Appellant's Authority.*—Brown, June 24. 1823; 2. Shaw's Ap. Cases, 373.

*Respondent's Authorities.*—Bynk. Quest. Jur. Pub. lib. 1. c. 3.; 1. Robertson's Reports, 196; 1696, c. 5. Abercrombie, Dec. 17. 1667, (12,313.) Wilson, Feb. 26. 1787, (12,353).

A. DOBIE—A. MUNDELL,—Solicitors.

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\* When this judgment came to be applied in the Court of Session, a difficulty arose as to the practicability of doing so according to the established forms of that and of the Jury Court, and from the circumstance of all the original parties being dead except the respondent. After consulting all the Judges, the Court superseded the matter till a communication should be made with the House of Lords. See 9. S. & D. p. 17. In consequence, a bill was brought into Parliament, (Oct. 1831), to set aside the judgment, and rehear the parties, but was afterwards withdrawn; and, on a search of precedents as to the competency of amending the judgment, the House ordered the instruction to examine the parties to be struck out.

No. 32.

FREDERICK CAMPBELL STEWART, Appellant.  
*Solicitor-General (Sugden)—Adam—Kaye.*

STEWART MURRAY FULLARTON, and OTHERS, Respondents.  
*Brougham—Haldane.*

*Entail.*—Held, (reversing the judgment of the Court of Session), that although an entail contain a prohibition against selling, yet, if the irritant and resolute clauses do not apply to sales, the heir in possession is entitled to sell, and is not bound to reinvest the price in other lands.

July 16. 1830.

1st Division.  
 Lord Alloway.

JOHN MURRAY STEWART of Blackbarony executed, on the 28th of May 1763, a deed of entail of his estate of Ascog, by which, on the narrative that he had resolved, for the standing of his family, to make the same, he conveyed, ‘under the burdens, conditions, provisions, clauses irritant and resolute, after expressed,’ the lands of Ascog, mansion-house thereof, mill and mill lands, and the place of sepulture and seat in the parish church of the family, to and in favour of himself, and the heirs of his body; whom failing, to Archibald M’Arthur, only son of John M’Arthur of Milton, and the heirs-male of his body; whom failing, (after other substitutions), to George Fullarton of Bartonholme, son of the deceased Robert Fullarton of Bartonholme, and the heirs-male of his body; but expressly providing and declaring, ‘that if the lands and others foreshaid conveyed by virtue of these presents, happen to fall and devolve upon any of the heirs-male of the body of the said John M’Arthur of Milton in virtue of these presents, or the heirs-male of the body of the said George Fullarton, that then and in that case they shall be holden and obliged to tailzie, as I hereby bind and oblige them to tailzie, the said lands of Milton and Bartonholme respective, upon the same series of heirs, and under the same provisions, clauses irritant and resolute, that are contained in the present tailzie, and cause record the said tailzie in the Register of Tailzies, and that within five years after the succession, in virtue of this present tailzie, shall devolve upon them respectively.’ The deed then contained (among others) the following prohibition:—‘That it shall be noways leisum or lawful to the heirs of tailzie and others succeeding to me by virtue hereof, in no time coming, to alter, innovate, and annul this present tailzie, or invert the order of succession hereby appointed and settled by me, or which shall hereafter be appointed and settled by a writing under my hand in manner foreshaid, any manner of way, nor to possess

‘ the above lands and estate by any other title than by this pre- July 16. 1830.  
 ‘ sent deed of entail; and they shall be bound to registrate the  
 ‘ same, and an additional settlement or deed relating thereto, in  
 ‘ the Record of Tailzies and General Register, within six months  
 ‘ after my decease, and their coming to the knowledge thereof:  
 ‘ nor shall they have any power or liberty to sell, annailzie, or  
 ‘ wadset the lands and others foresaid, or any part thereof, ex-  
 ‘ cept allenary such a part and portion of the same as shall  
 ‘ be found necessary for relieving, paying, and satisfying the  
 ‘ debts and obligements contracted and granted by me, and  
 ‘ which shall be justly resting by me at the time of my decease,  
 ‘ or so much of my said debts as shall not be cleared and satis-  
 ‘ fied by any of the heirs of tailzie out of their own proper  
 ‘ means and estate, in manner underwritten; with power to any of  
 ‘ my heirs of tailzie, succeeding to me by virtue of these presents,  
 ‘ to wadset, under reversion, so much lands allenary as shall cor-  
 ‘ respond and have just proportion to my said debts resting and  
 ‘ unpaid in manner foresaid, and no more, and whereof the mails  
 ‘ and duties shall not exceed the annualrent of the debt to be paid  
 ‘ therewith: nor shall the said heirs of tailzie, and others succeed-  
 ‘ ing to me, in any time coming, have power or liberty to con-  
 ‘ tract any debts, or sums of money, or even grant provisions to  
 ‘ younger children, sons or daughters, except as hereafter is pro-  
 ‘ vided, whereby the lands and others above-written may be any  
 ‘ ways affected; or grant any heritable or moveable bonds, infest-  
 ‘ ments of annualrent, and other rights and securities whatsoever,  
 ‘ whereby the lands and others foresaid may be any ways evicted  
 ‘ or carried off, to the prejudice of the next succeeding heir of  
 ‘ tailzie,’ &c. Then followed the irritant and resolute clauses,  
 in these terms:—‘ Declaring, likeas it is hereby expressly provided  
 ‘ and declared, and shall be provided and declared in the charters,  
 ‘ infestments, and others to follow hereupon, that if any of the heirs  
 ‘ of tailzie above-mentioned, or the husbands of the heirs-female,  
 ‘ shall not use the name and arms of Stewart of Ascog, or shall  
 ‘ alter and innovate this present tailzie, or invert the succession  
 ‘ from the order hereby appointed, or which I shall appoint by a  
 ‘ writing under my hand, or possess the said lands and estate by any  
 ‘ other title than these presents, or fail to register the same, or any  
 ‘ additional settlement relative thereto, in manner as above; or if  
 ‘ they wadset any of the lands and others foresaid, except so much  
 ‘ allenary, or such a part or portion of the same, as shall be found  
 ‘ necessary for relieving, satisfying, and paying the debts and  
 ‘ obligements contracted, and which shall be justly resting the time

July 16. 1830. ' of my decease, or so much of my said debts as shall not be cleared  
 ' and satisfied by my said heirs of tailzie their own means and  
 ' estate, in manner foresaid, and which they have power to wadset  
 ' in the terms above provided allenary; or if they shall contract  
 ' any debts, or grant any provisions to younger children, sons or  
 ' daughters, (except as hereafter is provided), or grant any bonds,  
 ' heritable or moveable, or other rights or securities, whereby the  
 ' lands and others foresaid may be affected, evicted, or carried  
 ' away, to the prejudice of the next succeeding heir, then not only  
 ' shall the deeds so to be done by them be void and null in them-  
 ' selves, as if the same had never been granted or done, and shall  
 ' be noways valid for affecting and burdening the lands and  
 ' others foresaid, or any part thereof, to the prejudice of the next  
 ' succeeding heir of tailzie, their peaceable possession, bruiking,  
 ' and enjoying of the same, free of the said debts, deeds, and bur-  
 ' dens thereof; but also, the said heir contravening, for him or  
 ' herself alone, shall ipso facto lose and amit the benefit of this  
 ' present tailzie, and the lands and others foresaid shall fall and  
 ' accresce to the next heir provided to the succession as above,  
 ' in the same manner as if the former heir who shall contravene  
 ' had never existed, or had been deceased,' &c.

Although the prohibitory clause was thus directed against selling, yet it will be observed, that sales were not mentioned in the enumeration of the various acts to which the irritant and resolute clauses apply,—an omission which gave rise to the present question.

Besides the special disposition of the lands of Ascog, the entailor conveyed his whole heritable and moveable property to the respective substitutes, but declaring that they ' shall be holden  
 ' and obliged, in the strictest manner, by their acceptance hereof,  
 ' to convert the said heritable and moveable subjects generally  
 ' above disposed into money, and to uplift the debts and sums of  
 ' money above assigned; and, after payment of my proper debts  
 ' and the legacies, if any be, to ware, employ, and bestow the free  
 ' residue or remainder of my said separate effects, heritable or  
 ' moveable, when so converted, upon purchasing of land in Scot-  
 ' land; and to take the rights and securities of the lands so to be  
 ' purchased, in the form of a strict entail, to the same series of  
 ' heirs, and with and under the same conditions, provisions, bur-  
 ' dens, reservations, restrictions, limitations, clauses irritant, and  
 ' faculties, as are above set down with respect to my tailzied lands  
 ' herein mentioned; and to put the said tailzie on record, so as the

'lands thus to be purchased, and these my other lands, may be July 16. 1803.  
'conjoined inseparably in all time thereafter,' &c.

The deed was duly recorded, and on the death of the entailer Archibald M'Arthur (who assumed the name of Stewart) succeeded, and implemented the latter provision by purchasing the lands of Drumfin, and executing an entail which was duly recorded. Thereafter, on the death of Archibald M'Arthur, the present appellant, Frederick Campbell Stewart, Esq. succeeded as heir-substitute under both these entails.

To ascertain the extent of his powers, he brought an action of declarator before the Court of Session, to which he called the existing heirs of entail as defenders; and in which he concluded to have it found, that he 'has full and undoubted right  
'and power to sell and alienate the several lands, mills, teinds,  
'fishings, and whole other subjects contained in the two deeds  
'of tailzie before-mentioned, in any way he may think proper,  
'for a fair price, or other onerous consideration; and that the  
'pursuer has full and undoubted right and power to grant and  
'execute all dispositions, conveyances, deeds, and writings whatsoever, which may be requisite or necessary for effectually conveying the whole, or any part or parts of the said lands and others  
'which may be so sold and alienated; and that the pursuer is not  
'prevented from selling and alienating, in any way he may think  
'proper, for a fair price, or onerous consideration, the lands and  
'others before-mentioned by the foresaid two deeds of tailzie, or  
'either of them, or by any of the titles under which the pursuer  
'possesses the foresaid several lands and others. And, further, it  
'ought and should be found and declared, by decret foforesaid, that,  
'upon selling or alienating the whole, or any part or parts of the  
'said several lands or others contained in the said two deeds of  
'tailzie, for a fair price, or other onerous consideration, the said  
'Frederick Campbell Stewart, pursuer, has the sole, full, and exclusive right to the price or prices, or considerations thereof;  
'that the same are the pursuer's absolute property; and that he has  
'full power to use and dispose of the same at his pleasure; and  
'that the pursuer does not lie under any obligation to invest, employ, or lay out the same, or any part thereof, in the purchase,  
'or on the security of any other lands or estate or otherwise, for  
'the benefit of the said heirs-substitutes of tailzie, or any of them;  
'and that the said heirs-substitutes of tailzie before-named, or any  
'of them, have no right or title to interfere with or controul the  
'pursuer in the use or disposal of the said price or prices, or considerations to be received by him, in any manner of way: And



July 16. 1880. ' also, that the said heirs-substitutes before-named, or any of them,  
' have no claim or demand of any description against the pursuer,  
' or against his heirs and representatives, in the event of the pur-  
' suer's death, for or in respect of the sales or alienations which  
' may be made, or dispositions or other writings which may be  
' granted or executed by the pursuer, in the manner and on the  
' terms before specified; or for or in respect of the pursuer's using  
' or disposing at his pleasure of the said price or prices, or consi-  
' derations to be received as aforesaid,' &c.

In the meanwhile, the appellant had sold part of the lands, and the purchaser brought a suspension. At the same time the heirs of entail raised a counter action of declarator, to have it found ' that the said Frederick Campbell Stewart, defender, hav-  
' ing sold and alienated the foresaid lands and others contained in  
' the said two deeds of tailzie, that the price or prices, or consi-  
' derations received therefor, belong to the said Stewart Murray  
' Fullarton, and the other substitutes called by the said two deeds  
' of tailzie, and not to the defender to be used by him for his  
' own private purposes, and that the said defender has not the  
' power to use and dispose of the same at his pleasure; and fur-  
' ther, that the said Frederick Campbell Stewart, defender, is  
' bound to reinvest and lay out the said price or prices, or con-  
' siderations, and whole parts and portions thereof, in the pur-  
' chase and security of other lands and estates, for the benefit  
' of the pursuer, and the other substitutes called alongst with him  
' under the said two deeds of tailzie, and all of them; and that  
' the said pursuer has good right and title to prevent the defender  
' from using and disposing of the said price or prices, or consi-  
' derations so received or to be received by him, the said defender,  
' from the purchasers of the said lands and others, to his own ad-  
' vantage; and also, that in the event of the defender not reinvest-  
' ing the price or prices, or considerations received, or to be re-  
' ceived by him, for the lands and others acquired and possessed  
' by him under the foresaid two deeds of tailzie, in the purchase  
' of other lands and estates, to be taken to the pursuer and the  
' other substitutes as aforesaid, the said Stewart Murray Fullar-  
' ton, and each and every one of the other substitute heirs of tailzie,  
' under the foresaid two deeds of tailzie, have all and each of them  
' legal claims and demands against the said Frederick Campbell  
' Stewart, defender, or against his heirs and representatives, in the  
' event of the defender's death, for damages and pecuniary repa-  
' ration, to the extent of the price or prices, or considerations  
' received, or to be received by the said defender for the sale of the



‘ said tailzied lands and others, for and in respect of the said sale July 16. 1690.  
 ‘ or sales, or alienations, which have been made and executed, or  
 ‘ which may yet be made and executed by the defender, and for  
 ‘ and in respect of the said defender using and disposing of the  
 ‘ said price or prices, or considerations received, or to be received  
 ‘ as aforesaid, to his own exclusive advantage.’

These actions having been conjoined, the Court, after a hearing in presence of all the Judges, and receiving their opinions, pronounced this interlocutor:—‘ Find, That as the provisions of the ‘ Act 1685, c. 22., which regulates all questions with purchasers ‘ or creditors contracting with heirs of entail, have not been observed or complied with so far as regards sale and alienation, to ‘ which the irritant and resolute clauses are not applicable, and ‘ that the prohibitory or restraining and limiting clause cannot ‘ per se affect the purchaser, repel the reasons of suspension, ‘ find the letters orderly proceeded, and decern: But in the declarator at the instance of Frederick Campbell Stewart of Ascog, ‘ find, That the pursuer is infest and seized in the estate of Ascog ‘ and others, in virtue of two deeds of entail, under a provision by ‘ which it is declared, that the heirs of entail shall not “ have any ‘ power or liberty to sell, annailzie, or wadset the lands and others ‘ fosaesaid, or any part thereof,” and that the same is effectual and ‘ obligatory against the said pursuer, and that he has no right to ‘ contravene the same; and therefore assoilzie the defenders from ‘ the whole conclusions of the said action, and decern: And in the ‘ declarator at the instance of Stewart Murray Fullarton, Esq. of ‘ Fullarton, and others, heirs of entail to the estate of Ascog and ‘ others, find, That the said pursuers have, under the fosaesaid provision or restraining clause, a right to compel the defender, Frederick Campbell Stewart, and that the said defender is bound, to ‘ reinvest and lay out the price or prices, or considerations of the ‘ lands sold by him contrary to the said provision or restraining ‘ clause, in the purchase of other lands or estates, to be settled ‘ for the benefit of all concerned and interested in the said two ‘ entails, conformably, in all points, to the provisions and conditions therein contained, and according to the forms and practice ‘ of the law of Scotland; and find, That the defender is not entitled to apply or use the principal sums of the said prices or ‘ considerations to his own private purposes, benefit, or advantage, ‘ and decern.’ \*

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\* Lords President, Justice-Clerk, Hermend, Glenlee, Craigie, Robertson, Balgray, Pitmilley, Meadowbank, Mackenzie, and Medwyn, concurred in the judgment. Lords Gillies, Alloway, Cringletie, and Elkin, dissented. The Opinions will be found in 5. Shaw and Dunlop, 418.

July 16. 1830. Mr Campbell Stewart appealed.\*

*Appellant.*—On general principles of law, an heir of entail, if not effectually prohibited to sell or exercise any other act of ownership, is entitled to do that act. Accordingly the Court below have found, that the appellant is entitled to sell; but while they have done so, they have most inconsistently found, that he must reinvest the price for the benefit of persons who have no right to prevent him from selling. The ground on which this is rested is, that there is an obligation created by the prohibitory clause effectual against the appellant, and, on the other hand, a *jus crediti* in favour of the respondents. But this is a gratuitous assumption, because there is no such obligation as that which the Court has found to exist, either in the deed itself or at common law. In regard to the deed, the appellant might for the sake of argument admit, that the entailer had an intention to prohibit sales: but a mere intention is not sufficient; and the Court have held, that there is no effectual obligation or prohibition against selling. The question therefore comes to this, whether there is any provision in the deed, to the effect of reinvesting the price? It is not pretended that there is any such express clause, and therefore the judgment cannot rest upon the deed, but upon something else. It has accordingly been maintained, that it must be presumed to have been the intention of the entailer that effect should be given to his deed, and that the only way in which this will can be implemented, is by ordering the price to be reinvested. But this is just introducing the doctrine of implication, which has been by repeated decisions discarded in discussions relative to entails, whether arising with third parties or inter hæredes. Besides, there is no evidence that such an intention was ever in the mind of the entailer. On the contrary, his intention was to preserve the estate of Ascog; an intention inconsistent with the idea of the conversion of these lands into money, and the reinvestment of that money in other land.

Neither under the common law is there any such obligation as that which is contended for. The respondents themselves admit, that it is incompetent either to raise inhibition or to obtain an interdict, to the effect of preserving their alleged rights. But if there were any such rights in existence, they would be en-

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\* Pending the appeal he died, and it was revived in name of his testamentary trustees.

titled to the benefit of the diligence of the law to preserve them. July 16. 1830.

The practical conclusion from their argument therefore is, that the appellant is under an obligation, but that it is one which cannot be enforced—a proposition which is in itself a contradiction. Indeed, if the argument were correct, it would apply to the case where there is a defect in the entail in regard to the contraction of debt. In such a case it is admitted, that the estate might be adjudged in payment of the debt; but in order to be consistent, the respondents must go a step farther, and maintain, that they would be entitled to compel him to reinvest, although he had not the means of doing so, and although he had no power to prevent the estate from being adjudged. This, however, is obviously untenable.

*Respondents.*—There is a material distinction between the effect of an entail, as in a question with third parties, and inter hæredes. One who takes an estate under an entail, takes it by virtue of the will of the granter; and he cannot be permitted to evade the plain obligations imposed upon him by the granter, from the circumstance that the deed may be defective, so as not to protect the estate in a question with third parties. It is true, that fetters which have been omitted cannot be reared by implication; but, on the other hand, the legal effect of restrictions cannot be impaired by the neglect of some of the precautions necessary to render the entail complete. In the present case, the estate was given gratuitously, under the burdens and conditions expressed in the deed of entail; and one of these conditions was, that the heirs should not sell the lands. The appellant took the estate subject to that condition; and in doing so he necessarily came under an obligation that he would not violate, but would give effect to the will of the entailer. Prior to the statute 1685, entails contained nothing but prohibitory clauses; and at that time inhibition or interdict was competent and available, even against third parties. This shows, that the prohibition contained an effectual obligation. But by that statute clauses irritant and resolute were required, in order to protect the estate against purchasers or creditors; and as the diligence of inhibition or interdict is useful only to prevent the property being sold or adjudged, that diligence necessarily became thereafter inapplicable. But still this did not affect the question, whether there was or was not an obligation on the heir? That there was such an obligation, is shewn by the fact, that such diligence was competent. Besides, it is no test of the non-existence of an obligation, that diligence cannot be done in virtue of it; because, if this were correct, it would follow, that

July 16. 1830. provisions to wives and children in marriage-contracts did not constitute obligations. But it is established, that they confer a *jus crediti*, in virtue of which the wife and children may rank on the estate in competition with creditors. Accordingly it has been decided in numerous cases, and particularly in those of *Strathnaver*, of *Cumming of Pitlurg*, of *Young v. Young*, and of *Lockhart v. Stewart*, that an effectual obligation against the heir in possession is created by a prohibition in a defective entail.

The question therefore is as to what is the effect of the obligation, and the nature of the consequent *jus crediti* vested in the heirs of entail. This is to be ascertained by the will of the entailor. Now it is plain that his object was the preservation and standing of his name and family; and with that view he entailed lands, and ordered others to be purchased which he had never seen. It was thus indifferent to him whether the family was kept up by means of one estate or another. It was not so much the estate of *Ascog*, as the name of *Stewart*, which he wished to preserve. Such being his will, the only mode in which effect can be given to it is, by ordaining the price to be reinvested in land, and an entail executed agreeably to that made by the entailor himself. This is not a claim of damages, but a demand that the price, as a *surrogatum* for the estate, should be applied to accomplish the will of the entailor.

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In the course of the argument, the following observations were made:—

*The Solicitor-General* having commenced to state the case of the appellant,—

*Earl of Eldon*.—All the Judges were of opinion there was a power to sell; Is that disputed?

*Solicitor-General*.—No, my Lord.

*Earl of Eldon*.—As to the conclusions in the summons, there is an alternative one, that all the substitutes should from time to time have actions if the price is not reinvested. The Judges have given no opinion upon that, perhaps not thinking it necessary, there being a majority of the Judges in favour of another point.

*Solicitor-General*.—So I conceive.

*Brougham*.—We do not know that the Judges gave no opinion upon it.

*Earl of Eldon*.—It does not appear that they did.

*The Solicitor-General* proceeded in his argument, and referred July 16. 1830. to *Young v. Young*.

*Earl of Eldon*.—Does it appear in what year that case was before this House?

*Solicitor-General*.—Not at all, my Lord; it was never in the House of Lords; it was not referred to in the *Westshiells* case, *Stewart v. Lockhart*.

*Brougham (for the respondents)* was quoting some authorities and a case from Mr Robert Bell, and a dictum of Sir Ilay Campbell.

*Earl of Eldon*.—Do either of these lawyers say, or are there any authorities that point out the remedy to reinvest the purchase-money?

*Brougham*.—Certainly they do not.

*Earl of Eldon*.—It struck me, that though the summons upon your part has an alternative for reinvestment or actions of compensation, the Court has not taken any notice of that part of the summons about compensation.—And that leads to another consideration,—How the compensation in damages is to be recovered—against whom—and at what time and periods?

*Brougham*.—I am not unaware there may be some difficulties in shewing, at what time, and in what way, and according to what scale of compensation those damages are to be recovered; and I should submit, that that is one reason for adopting the other branch of the alternative, and giving rather an equitable remedy than a legal remedy.

*Earl of Eldon*.—Do the Judges go on to say what is to be done? It is one thing to say that the heir has done wrong, and another to say what is to be the effect of the act he has done, and how the matter is to be set right.—I will state to you what is the difficulty under the statute, as it strikes me. The difficulty is this,—that if the purchase-money is to be laid out in a new purchase, to be settled exactly in the same way, the moment that new purchase is made under the statute, the heir who takes, may sell again directly: and is he then to be permitted to go on selling, and undoing, and buying, and doing again to all eternity? for I do not see what the remedy is to be, and the Court below, in this case, has given no sort of deliverance upon the claim of damages. I do not know whether it would be the right way to proceed if damages were given; but it appears to me a most extraordinary thing to be said, that entail is to be made after entail every week, so

July 16. 1830. that fifty may be made in a year, and that nine-and-forty of them may be dissolved again within the year.

*Brougham.*—I am quite aware that I have to direct my argument to the case put by one of your Lordships; and I shall, I think, satisfy your Lordships, that there is an answer to the observation, not meaning to deny that that is the strict consequence of my argument:—He then proceeded in his argument to shew, that by serving heir under the deed of entail, the heir in possession bound himself to the conditions of his right.

*Earl of Eldon.*—If a Scotch estate is entailed after the year 1685, and there happen to be no sufficient clauses to prevent selling, and if a man serves himself heir of tailzie, can you argue, —or rather is not that a question—whether he admits more than this, It is true I cannot part with the estate in any way except by selling it, but (supposing that he is bound by the Act 1685) if I am not prevented from selling, do I admit by serving myself heir of such a tailzie more than that I cannot part with it unless by sale? Then comes the question again, Do I admit, that if I can sell I must invest the money, or be liable to penalties? What is that which by implication he admits if he serves heir of tailzie, except that he is heir of tailzie under an entail, under which you admit that he can sell to a purchaser?

*Brougham* proceeded in his argument, and stated, that whenever the substitute reinvests, it is for the benefit of the heirs who succeed.

*Earl of Eldon.*—Must you purchase in Scotland; or may you not let it go out of Scotland?

*Brougham.*—It could not by the prohibition be settled anywhere else.

*Earl of Eldon.*—But the money might have an inclination to come to England.

*Brougham.*—It is possible. If he can be called upon to reinvest it, he cannot reinvest it anywhere else; it could not be carried beyond the jurisdiction of the Court. He only has that estate while he lives; he cannot part with that estate, and pocket the purchase-money. The entailer never meant Black-acres should go out of his family,—he meant that it should never be sold at all; but he has failed in that.

*Lord Wynford.*—Is there any mode of keeping the money out of the seller's pocket? His security would be very trifling if it could not.

*Brougham.*—The Court of Session might proceed to execute

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their judgment in the usual way. The money is in the seller's pocket, and the seller is proceeded against. If he goes off to America and spends the money, then the substitute has lost his whole chance of redress. There cannot be the least doubt about that. Indeed, what remedy, my Lords, can you have by the constitution of a Court of Equity, except that whilst the person is in the jurisdiction of that Court, or, not being amenable to its jurisdiction, whilst he has property on which you may proceed by distress, you may avail yourself of it?

*Earl of Eldon.*—What we want to know is, what remedy you have against the seller if he does not go away? that is, if he stays, and the money remains in his own hands. I do not mean to say that there may not be a remedy, but I confess I am a little disappointed in not seeing that any of the Judges touched that question, though it is a matter now stated in this House to be one of very great difficulty. What is to be done?

*Brougham.*—I should suppose they did not touch upon that, because they took it for granted that the Court would proceed against the seller to reinvest the price exactly by the same course of proceeding by which they obtain performance of any one of their judgments and decreets, if there is no land on which they might go. The party, of course, is liable to the process of Court for refusing to obey the order of Court:—Having afterwards adverted to *Young v. Young*,—

*Earl of Eldon.*—Does any one know what became of the money or estate in that case?

*Brougham.*—We cannot trace it. It is ordered that he is to reinstate the money, to re-employ the price, and take security for the term of the entail.

*Haldane (for the respondents)* having alluded to the question of damages,—

*Earl of Eldon.*—Suppose it possible that this House should be of opinion that you cannot maintain a claim for investment, but that you must have an action for damages; or that it is a question that might be argued, whether you are not entitled to an action for damages; still, as no judgment has been given in the Court below, the House can give you no opinion on that, for there is no appeal upon that, there being no deliverance on that part of the summons.

*Haldane.*—That point did not seem necessary.

*Earl of Eldon.*—The summons puts it in two ways: first, the



July 16. 1830. necessity of a right of reinvestment; it also insists, in the second place, on the right to an action for damages. The Judges have delivered their opinions upon the right of reinvestment, but there is no opinion at all as to an action for damages. In their deliverance there is no enforcement of it. The consequence of that would be, that as this House can determine nothing originally, if you can't make out your claim to a right of investment, you can't say a word about an action for damages, because there is no decision on that point appealed from.

*Haldane.*—I only wished to shew, that in a still stronger case, in the case of application for damages, that that might be founded upon the authority of the case of *Bryson v. Chapman*; and if so, then, a fortiori, we may insist on a claim for reinvestment, which is less, as it appears to me.

*Earl of Eldon.*—Then you see we get into this difficulty, which the House does not know how to get out of. If you are to argue that you have a right to an action for damages, and to a right of reinvestment, we have no opinion whatever of the Judges below on that point, for as to that the Judges have said nothing. We cannot therefore hear you argue on the ground of your having an action for damages, when we are to decide whether you have a right of investment or not: We certainly can't agitate that question about an action for damages.

*Haldane*, in the course of his argument, having alluded to the land-tax redemption Acts as bearing some analogy to the point in question,—

*Lord Wynford.*—In the land-tax redemption Acts it is expressly stated what you are to do.

*Haldane.*—Supposing too much land was sold, it might be re-invested in order to meet the intentions of the party. I am only meeting the question as to the difficulty.

*Earl of Eldon.*—In such a case, if a parcel of land were sold, the land-tax redeemed, and an Act of Parliament were to order the money to be laid out again to the same uses, the same question could not arise after the money was laid out to the same uses; but, in the present case, the new owner of the land would have the same title to sell as the present owner of the land insists on. In England, where an estate is limited to A for life, with remainder to B in tail, until that Act of Parliament passed which you mention, no Court thought itself at liberty to refuse, or to do otherwise than to compel the laying out of money in land. That was on this ground, that a tenant in tail could not the in-

stant he received land dispose of it: he must wait till he was able to suffer a recovery, if he were an adult; if he were not an adult, he might wait until he was, and then suffer a recovery. What was done by the Act of Parliament you mention amounts to no more than this, that inasmuch as when a person arrived at an age, and had a capacity of aliening the land, a Court of Equity, on trustees applying to a Court of Equity, might enable the money to be paid over to him, instead of insisting on that operation of the investment of land being gone through. I remember a case, I think it was either of Serle's coffee-house or a house in St James' Square, before that Act passed, being bought pretty nearly thirty times over, in order to suffer so many recoveries to get the money out of Court. That was on this ground, that the tenant in tail, in whom the land might be invested when the money was laid out, might not be able to suffer a recovery even in the course of his own life. It might happen that he might die before he could suffer a recovery, and Courts of Equity have taken a great deal of care to preserve that chance to him.

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*Haldane.*—Having referred to the case *Young v. Young* in Lord Monboddo's manuscripts,—

*Earl of Eldon.*—When was that case first discovered?

*Haldane.*—Subsequently to the case being argued the first time; and it is noticed I find in the answer to the reclaiming petition before the Court of Session, but had not been before their Lordships previous to the reclaiming petition.

*Earl of Eldon.*—Would there be any means of seeing the contents of the instrument on which that decision was made? Do the contents of it appear on the record? It is very singular no one should have known of it.

*Solicitor-General.*—Lord Alloway and Lord Eldin said expressly there was no case in point.

*Earl of Eldon.*—Nor is it mentioned by the other Judges. It was so understood here formerly in other cases, that there was no case; and no mention was made of this of *Young v. Young*. But I suppose if that judgment were actually pronounced in the Court of Session, there must be some record of it. I should very much like to see what is the nature of the deed on which that judgment was given.

*Brougham.*—The report of the case states what it was generally, it does not give the summons. We don't quote it in consequence of a search made for the purpose of this cause, but from a book of decisions which is public and general.

July 16. 1830. *Earl of Eldon.*—The extraordinary circumstance is, that none of the Judges whose judgment is now in question took any notice of any such case.

*Haldane.*—They took notice of it in the addition to their opinions. It is there said, ‘ we have considered the reclaiming petition, with the answers, and we see no reason to alter the opinion we have expressed ; on the contrary, it is confirmed by the decision referred to in the answers which have been made public ‘ since the date of our opinion.’ Then a reference is made to the very case, in the margin, Supplement to the Dictionary of Decisions, vol. v. p. 884.

*Earl of Eldon.*—I see, from what is said in Stewart and Lockhart, that the judgment in the Court below was carried by the narrowest majority;—a term by which we understand here, that it generally means that there is one Judge more on one side than there is on the other side. I wanted to know the value of that case, supposing nothing since to have happened. If you have the papers in that case, we should be glad to look at them. But the case was removed back again to the Court of Session, and it does not appear to have been farther pursued there. The case stands thus:—I think that it was a case in which there was a judgment given by the narrowest majority of the Court of Session, and there was an appeal to this House ; and this House could not at that time make up its mind to agree with them ; they sent it back ten years ago, and the parties have no farther litigated, as far as we know. What the weight of the case is, must be judged of by circumstances ; and perhaps Mr Haldane observed a little severely on the leading Counsel and judicial opinion. This House, I see, is not unfrequently observed upon in the Court of Scotland : there may be a little set-off adjudged to both. When we are told of the weight of authority, *numero et pondere*, we ought to know what is the number as well as the *pondera*.

*Haldane.*—It is stated by the Counsel on the other side, that it was most improperly argued—that it was so imperfectly argued in the Court below, that there was not a greater majority in favour of the rights of the heir-substitute than of the successful party.

*Earl of Eldon.*—We shall get the House into the same difficulty as James Boswell on one occasion placed me. I had the honour of arguing a case before the bar of the House of Lords with him, and, being senior in the profession, I stated, with all humility, the extreme pressure under which I laboured, for I was

to argue against the unanimous opinion of the fifteen Judges. He came to the bar, (with what degree of modesty is not for me to determine),—but he blamed me to the House for prejudicing the cause of my client; stating, that when the Judges differed, they thought very little about the matter, and when they agreed, they thought nothing at all about it. July 16. 1830.

*The Solicitor-General*, in reply, having commented on the slender authority of *Young v. Young*, as having never till recently been published,—

*Lord Chancellor*.—It does not take away the authority of the decision, that it was not published; but if published and known to the world, and acquiesced in, it derives more authority from that circumstance.

EARL OF ELDON.\*—My Lords, I speak a language which is not new from the mouth that now pronounces it, when I say, that, with respect to the law of Scotch entails, my mind has been oppressed with difficulties for several years past, and which, at this moment, I confess I feel it difficult to get rid of. My Lords, with respect to the question, whether entails were known to the law of Scotland—whether they were countenanced by the common law of Scotland previous to the Act of 1685,—if I had heard nothing upon the subject of entails but what I can read in that Act of 1685, I should have been disposed to say that entails, after 1685, inter hæredes, as well as with respect to successors, creditors, &c. were to be binding only if they were framed according to that Act; but, my Lords, when I recollect what passed in the case of *Stormont*, and what passed in other cases actually adjudicated in Scotland, as to entails previous to the Act of 1685, which have been referred to as having constituted the common law of Scotland previous to 1685, I protest it appears to me,—attending likewise to what is to be found, perhaps, however, only after great consideration, whether it was or not to be found in the Acts of Parliament of more modern date,—it does appear to me to be extremely difficult indeed to say, that they did not form a part of the common law of Scotland, which at this moment ought to be regarded as having an effect upon the right of persons claiming under entails inter hæredes. My Lords, with respect to the deed in the case of *Stewart v. Fullarton*, I do not think any man can read that deed, ponder over its contents, and look at all the clauses of it—those clauses of it of which no notice whatever is taken in any part of the summons—without being quite satisfied that the author of that entail had not the least notion in the

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\* After the argument was concluded, his Lordship addressed the House.

July 16. 1820. world of such a case arising as that one of the heirs of entail should call upon another heir of entail to invest the price of the estate; because I think no man can read that instrument without seeing, that the person who was the author of that entail had not the slightest idea in the world that he had left it in the power of any body to sell the estate. My Lords, we must, however, when we read this entail, judicially apply the strict doctrines of law to the interpretation of it; and it is one thing to be quite satisfied, as I protest I am, that the author of that entail had not the least notion that the estate could be sold, and therefore, could have no notion that the price, which could arise only from the sale if actually made, could be called for in judicial proceedings; but we are, on the other hand, to recollect, that it does not depend upon his notion whether the estate could be sold or not, but upon what is the law of the case; and I observe here, that, according to the summons, the persons who are the pursuers in this cause had a very considerable doubt how to state their claim. In the first place, they contended for that which they could not support, namely, that the party had not a right to sell the estate; but then they say, if he had a right to sell the estate, still there is the money which may be called forth from his possession, and that money shall be laid out again in the purchase of other lands, to be settled to the same uses, and under the same clauses, prohibitory, irritant, and resolute, as are contained in the original instrument. Now, it is quite impossible, according to the settled law of Scotland, to deny that the Judges were right in a point in which I understand them to have been unanimous, namely, that for want of proper clauses in the instrument, the party may sell the estate that he took. No doubt he may sell the estate. With respect to the decision they have made, and carrying the matter no further, I apprehend this House can have no difficulty at all in deciding that such is the law of Scotland. My Lords, they have however told us, that he is bound to lay out the purchase-money in the purchase of another estate, to be settled in like manner. With respect to that proposition of law I speak with great deference, and certainly bound, I think, to say, that more consideration than I have yet been able to give to that proposition is due to it. But I do confess I am exceedingly disappointed in not being able, in any papers whatever, either in this case or in any other case with which I have had to deal, to learn from the judgments, or from the reasoning of the Judges, how it is that they are to enforce an obligation of that kind to lay out the money. Whatever be their powers, I do not find that there is any instance of such an action having been maintained; and if, upon looking at the whole of the instrument, your Lordships find that this person meant to make his entail under the Act of 1685, and if he has failed in making the entail effectual according to the Act of 1685, you have then to ask yourselves, Whether a common law obligation arises out of such an instrument, in re-

spect of which,—not according to any thing that has hitherto been determined, but according to abstract notions of what is right and what is equitable,—the Court of Session, somehow or other, (I know not how), is to lay out the price, or to order that price to be laid out in the purchase of an estate,—not in the purging the estate from debts contracted, or in other remedies of the hæredes inter se, but in the purchase of another estate,—taking care that after such purchase the money is laid out under an entail, in its contents the same as the original entail; while that estate, so purchased in the morning, is liable to be again sold in the afternoon?—a sort of obligation which may be again enforced by some process in the Court of Session, to apply the money that afternoon in the purchase of a new estate, to be settled again under the same clauses, prohibitions, &c.—the consequence being, that in truth you convert this species of entail, which does not prevent the sale of the estate, into what we in the law of England should call a settlement, with a power of sale and exchange. My Lords, I see, in the course of a learned note which has been laid before me, of the grounds of the opinion of my Lord Balgray, that he is not startled with the difficulties attending the entail of money—he refers to teinds and other circumstances. For reasons that I may have an opportunity of stating when this case is further considered, I apprehend it will be found, that that has not much of application to this subject.

My Lords, the question really is this—Does it appear clearly upon this deed of entail, that the party meant to make his entail according to the Act of 1685, in the execution of which purpose those who advised him, have failed to advise him rightly? or supposing there was authority to make it at common law,—which I do not mean to deny; I think I am bound by the great authorities to suppose there is such authority—Did he mean to make an entail to stand or fall by its assimilation to what was required by the statute of 1685? My Lords, I put the case so, because I think, if you will examine the deed itself, you will find that he could not intend to execute an entail which did not include the estate of Ascog. If you come to look at the obligations upon some of the substitutes, you will see that they are not imposed on them, if they should have possession of any estate that is bought with money produced by the sale of the estates mentioned in the instrument; but they are laid upon those who come to the enjoyment of the Ascog estate and to other estates, which they are ordered to entail if they come into possession of them, together with the estate entailed by this deed. If they come into possession of the estates entailed by this deed, they are to entail their own estates; but supposing they do not come into possession of the estates entailed by this deed, where is the obligation then that is laid upon them? Here also you must have, by implication, obligations carried a great deal further than the terms of the deed itself, (which admits of no

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July 16, 1830. construction by implication), that expresses the obligation intended to be created. My Lords, what I am still totally uninformed of is this—What are the powers of the Court of Session with respect to this money? Can they order it to be paid to trustees? Can they make themselves the trustees? How is the money to be preserved? How does it happen that we never have had an action of this sort till of late years?—How are all those questions to be answered? or how is this House to do its duty, unless it can be informed how it can be done by the power of the Court of Session itself? How can this House do its duty, but by prescribing to the Court of Session what they are to do? and I do not apprehend the House will ever take upon itself the obligation of prescribing to that Court what they are to do, if they have no assistance in that Court to point out to them their course of action.\*

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EARL OF ELDON.—My Lords, The cause in which I will take leave to move your Lordships to proceed to judgment, is the cause in which the appellant is Frederick Campbell Stewart, Esq. of Ascog, and the respondents are, Stewart Murray Fullarton, Esq. of Fullarton, and others, heirs of entail of the estate of Ascog; and I proceed to state to your Lordships the facts of the case.

My Lords, it appears that a gentleman of the name of John Murray of Blackbarony, otherwise denominated John Stewart of Ascog, executed a deed of entail of the 28th of May 1763. The appellant's Case states part of that deed of entail, and the respondents' Case also states part of that deed of entail. It occurred, however, that it might be material in a case of this importance to see the deed of entail itself; and, in the course of what I have to offer to your Lordships, I shall state presently some parts of that deed of entail not noticed, I think, in the printed Cases.

I proceed to mention to your Lordships, that the appellant is represented as having succeeded to the lands contained in the deed of entail, as a substitute heir of entail under the destinations contained in it. I should state also, that there were two deeds of entail—that of the lands of Ascog and others; and the other was of land that was to be purchased with the clear residue of the entailer's heritable and personal estate, converted into money and laid out in the purchase of lands. These other lands so purchased were, as the Cases represent, to be entailed in the same manner as the Ascog estates and others, so as that the lands so purchased, and the other lands, might be conjoined inseparably in all time thereafter.

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\* The further consideration of the cause was then adjourned; and thereafter judgment was given at the same time in this and the two following cases.

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My Lords, there was a summons and supplementary summons instituted by the appellant, which sought to have it found and declared that the appellant, who had succeeded to the lands in both entails, had full and undoubted right and power to sell and alienate the several lands, &c. contained in the deeds of tailzie, in any way he might think proper, for a fair price or other onerous consideration; and that the pursuer had full and undoubted right and power to grant and execute all dispositions, &c. whatsoever, which might be requisite or necessary for effectually conveying the whole, or any part or parts of the said lands and others, which might be so sold and alienated; and that the pursuer is not prevented from selling and alienating in any way he may think proper, for a fair price or onerous consideration,—(What do those words, 'onerous consideration,' mean? If they mean any thing but a fair price, I am unable to say precisely what they mean),—the lands and others before-mentioned; nor from granting and executing the dispositions and others before-mentioned by the foresaid two deeds of tailzie, or either of them, or by any of the titles under which the pursuer possesses the foresaid several lands and others. And, further, it ought and should be further found and declared by decret, that, upon selling or alienating the whole, or any part or parts of the said several lands or others, contained in said two deeds of tailzie, for a fair price or other onerous consideration, the said pursuer has the sole, full, and exclusive right to the price or prices or considerations thereof; that the same are the pursuer's absolute property, and that he has full power to use and dispose of the same at his pleasure; and that the pursuer does not lie under any obligation to invest, employ, or lay out the same, or any part thereof, in the purchase or on the security of any other lands or estates, or otherwise, for the benefit of the heirs-substitute of tailzie, or any of them; and that the said heirs-substitutes, or any of them, have no right or title to interfere with or controul the pursuer in the use or disposal of the said price or prices, or considerations to be received by him, in any manner or way; and also that they, or any of them, have no claim or demand of any description against the pursuer, or against his heirs and representatives in the event of the pursuer's death, for or in respect of the sales or alienations which may be made, or dispositions or other writings which may be granted or executed by the pursuer, in the manner and on the terms before specified, or for or in respect of the pursuer's using or disposing, at his pleasure, of the said price or prices or considerations to be received as aforesaid.

I have taken the liberty of troubling your Lordships to state all this at large, because it may be material to advert to what is the effect of the judgment of the Court upon the whole matter of the summons. Your Lordships will observe, that these summonses are large enough to include these propositions;—namely, that he has a clear right to sell these estates; that he has a right to apply the price



July 16. 1830. as he thinks proper to apply it; that there can be no demand on him for reinvestment of price in the purchase of another estate; that there can be no demand upon him in respect of his having applied the money he has sold the estate for to his own use;—and what he asserts is, in effect, an assertion, that he would not be liable to damages, any more than he was liable to be called upon to lay out the money in the purchase of another estate to be settled to the same uses.

My Lords, defences were lodged for the respondents, in which it was denied 'that the pursuer could make an effectual sale;' and, secondly, it was maintained, 'that esto that he could, he was bound 'to reinvest the price in lands, to be held under the conditions of the 'entail, and in favour of the same series of heirs.' Here your Lordships may observe, that, according to this defence, the proposition which it contends for is, that the pursuer, if he had a power to sell, was bound to reinvest the price in lands, to be held under the conditions of the entail, and in favour of the same series of heirs. I have learned in the course of many years, in this House, that, in Scotch causes, there is nothing more material, with a view to your Lordships forming a right judgment, or more for the benefit of the lieges of Scotland, than to endeavour, if possible, to apply the mind strictly to the matters contained in the summonses and defences; and that this House should proceed distinctly, and only, upon what is stated in the summonses and what is stated in the defences, and what is done in the judgment of the Court below with regard to what is to be found in the summonses and in the defences; and not to deal with matters to which the pleadings do not extend.

My Lords, the respondent, one of the defenders, brought another action, which was remitted to the other proceedings. This summons states the entail, and sets forth, that Mr Fullarton is one of the heirs of tailzie to the foresaid lands and others before described, under each of the two deeds of tailzie before narrated, and is thereby entitled to prevent the said lands and others, so tailzied, or any part thereof, from being carried off, or the provisions in favour of him and the other substitutes called along with himself by the said two deeds of tailzie, destroyed and rendered of no avail to him or any of the substitutes, by the said tailzied lands and others being sold, and the consideration money being applied to other purposes than what are provided by each of the foresaid two deeds of tailzie.

It may here be asked, what are the purposes to which the consideration money, if a sale is made, is provided to be applied by the deeds of tailzie? If any, they must be implied purposes, as it does not seem that any are expressed in case of a sale being made.

The summons then subsumes that Mr Stewart of Ascog, (the appellant), as heritable proprietor of, and lawfully vested and seized in, and in possession of the whole lands and other subjects before by virtue of titles made up in his person, as heir-substitute of tailzie

therein under the two deeds of tailzie before-mentioned, is prevented by the said deeds of tailzie or otherwise, (referring the prevention to some other causes of prevention if the said deeds do not prevent him), from selling or alienating the said lands and others, and from disposing of the price or prices, or consideration received or to be received on the sale and alienation of the said lands and others, or any part thereof, unless, upon making such sale or sales, he, the defender, reinvests the price or prices, or consideration to be received on said sale or sales, in the purchase of other lands of equal value, and to be conveyed by him to the pursuer and the other substitutes called alongst with him as foresaid, and under,—(I beg your Lordships' particular attention to this),—'and under the same provisions, conditions, limitations, and otherwise, as the defender himself possesses the fore-said lands and others under the foresaid two deeds of tailzie.'

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It may here be mentioned as a fact, that the defender had sold part of the entailed lands, and therefore the summons proceeds thus:—  
'And as the defender has already sold and alienated the foresaid lands and others, the price or prices of which he is threatening, or has threatened, to apply to his own exclusive advantage, which renders it necessary for the pursuer to prosecute this action of declarator; and that therefore it ought to be declared, that, having so sold or alienated, the prices or considerations belong to Fullarton and the other substitutes in the entail, and not to the defender: That he is bound to lay out the prices in the purchase of other lands, for the benefit of the pursuer and other substitutes under the deeds of tailzie, and all of them; and that he and they have right to prevent the defender from using and disposing of the price or prices, or considerations received or to be received by him from the purchaser, to his own advantage.'

This summons, so far as it is stated, is a negative upon the appellant's alleged right to apply the purchase-money to his own use; and then it proceeds to advert to his not so investing the price, or other considerations; and in that case its conclusion is, or further conclusion is, 'that the said Stewart Murray Fullarton, and each and every one of the other substitute-heirs of tailzie under the foresaid two deeds of tailzie, have all and each, and every one of them, legal claims and demands against the said Frederick Campbell Stewart, defender, or against his heirs and representatives in the event of the defender's death, for damages and pecuniary reparation, to the extent of the price or prices, or considerations received or to be received by the defender for the sale of the said tailzied lands and others, for and in respect of the said sale or sales, or alienations, which have been made and executed, or which may be yet made and executed by the defender, and for and in respect of the defender using and disposing of the said price or prices, or considerations received or to be received as aforesaid, to his own exclusive advantage.'

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Your Lordships will here observe, that each and every heir-substitute is here assumed to have a claim of damages if the price or prices are not invested : If part be invested, it follows that, for such part as is not invested, they and each of them, and, as it should seem, born or not born, have, and each and every of them has such a claim for damages, and against assets if not made good, against the defender ;—the summons certainly not informing us whether one is to proceed for all substitutes, or each for himself ; or how assets, after death, are to be dealt with, or how actions are to be brought and proceeded in from time to time ;—and, according to the language of the summons, each and every one of the substitutes, it is asserted, has a claim to the extent of the price or prices received for the estate sold, and not merely to the extent of what each and every one respectively had suffered by the sale.

My Lords, there was a hearing in the presence of both Divisions. The Judges were divided in their opinions, the majority certainly being of opinion with the pursuer Fullarton ; and their judgment is to this effect :—‘ The Lords having considered the information for Frederick Campbell Stewart, Esq. of Ascog, pursuer, and for Stewart Murray Fullarton, Esq. of Fullarton, and others, heirs of entail to the estate of Ascog and others, under two several deeds of entail produced, defenders, conjoin the processes ; and in the process of suspension find, that as the provisions of the Act 1685, c. 22.’ (which your Lordships may recollect is an Act with respect to entails in Scotland), ‘ which regulate all questions with purchasers or creditors contracting with heirs of entail, have not been observed or complied with as far as regards sale and alienation, to which the irritant and resolute clauses are not applicable, and that the prohibitory or restraining and limiting clause cannot, per se, affect the purchaser, Repel the reasons of suspension, find the letters orderly proceeded, and decern. But in the declarator at the instance of Frederick Campbell Stewart of Ascog, find, That the pursuer is infest and seized in the estate of Ascog and others, in virtue of two deeds of entail, under a provision by which it is declared, that the heirs of entail shall not have any power or liberty to sell, annailzie, or wadset the lands and others foresaid, or any part thereof, and that the same is effectual and obligatory against the pursuer, and that he has no right to contravene the same ; and therefore assoilzie the defenders from the whole conclusions of the said action, and decern : And in the declarator at the instance of Stewart Murray Fullarton, Esq. of Fullarton, and others, heirs of entail to the estate of Ascog and others, find, That the pursuers have, under the foresaid provision or restraining clause, a right to compel the defender, Frederick Campbell Stewart, and that the defender is bound, to reinvest and lay out the price or prices or considerations of the lands sold by him contrary to the said provision or restraining clause, in the purchase

‘ of other lands or estates, to be settled for the benefit of all concerned  
 ‘ and interested in the said two entails, conformably in all points to  
 ‘ the provisions and conditions therein contained, and according to  
 ‘ the forms and practice of the law of Scotland; and find that the de-  
 ‘ fender is not entitled to apply or use the principal sum of the said  
 ‘ prices or considerations to his own private purposes, benefit or ad-  
 ‘ vantage, and decern.’

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Your Lordships see, therefore, that whatever these summonses sought to have declared in judgment, nothing more is declared in judgment, except that this gentleman is bound to lay out this money in the purchase of other estates, to be settled to the same purposes. With respect to that part of the summons which speaks of damages upon the part of the defender, as contradistinguished from the obligation to lay out the money for which the lands have been sold in the purchase of other estates to be settled to the same uses, this judgment is entirely silent: the consequence of that is, that the only point which can be now considered as being in appeal before your Lordships is, Whether this gentleman, Mr Stewart, is bound to lay out the money which has been the price of the estates he has sold, in the purchase of other estates to be settled to the same uses? It may possibly be, that the same principles on which your Lordships find that he is to lay out the price of the lands sold in the purchase of other estates, to be settled to the same uses, may govern the decision on the question, whether an action for damages would, at the suit of one, or all and each of the heirs-substitute, be maintainable against Mr Stewart, or his assets in case of his death? but it is apprehended, that all regularity of proceeding here upon appeal suggests, that, there being before us no deliverance upon that part of the summons by the Judges below, and there being no appeal to us on that point, your Lordships' consideration must be confined to the only point which is raised. The judgment, I understand, admits that Stewart of Ascog may, consistently with the deed, sell,—that of course the purchaser may buy,—but that it must be understood that the deed itself, in some part of the terms found in it, or by law, as it relates to entails, requires the seller to lay out what he has received or shall receive from the buyer, in the purchase of other lands to be settled to the same uses; and which, when bought, may also be sold, and the money arising from the land so also sold being to be also laid out; and, in like manner, sale and purchase may be made again and again, reinstating from time to time the purchase-money as often as sales shall be made.

My Lords, the question, whether the Judges are right or wrong in the judgment which they have pronounced, and which I have read to your Lordships, it would very ill become me to consider not to be a question both of the greatest importance and greatest difficulty, recollecting that the Judges of the Court of Session have been very much now and before divided in opinion upon that species of question. Judges

July 16. 1830. of great name and of high character have thought and think differently from each other upon this subject; and therefore all that I could do in this case was to give to it the most anxious consideration before I presumed to state my own opinion; and I take leave to say, that I do not address your Lordships until I have given that anxious consideration of this most important and difficult case.

My Lords, it is not my purpose to state to your Lordships the various arguments upon points arising in former cases which have come by appeal before this House, or the various arguments which are to be found in the papers printed in the former cases, or in this case, or the various arguments which your Lordships have now heard at your bar, or upon the various points discussed in reasoning, to be found in printed opinions of the learned Judges in the Court of Session: To consider them anxiously, to reconsider them all most anxiously, has been a duty which I hope has been duly attended to; and to state the result of that consideration, and that which appears to me to be the better opinion for your Lordships to express in judgment, is what I propose—not to discuss all the matters suggested in argument in the various papers and proceedings alluded to. This species of case is not new to me. Some years ago there was a case before your Lordships in which we had points of a like nature to consider; and, when we had that case before us, it was urged or contended, that if the question was inter hæredes, and not between heir and purchaser, the heir,—though the deed did not contain all the clauses prohibitory, irritant, and resolute, and though purchasers would be safe,—the heir selling would be answerable to the substitutes (having a species of *jus crediti*, or some right by law) for the price for which the heir sold, and the damage which they sustained by alienation of the estate. When that case was before us I took the liberty of observing, that, considering that the statute of entails was made so long ago as the year 1685, and that a great many cases had most probably occurred in which claims of this nature might have taken place, considering the length of time the statute had been in force, and attending to the settled doctrine about implication, it was very extraordinary that no case could then be cited to us in which a judgment to that effect had been given and applied in the Court below; and the cause was therefore remitted back to the Court of Session to reconsider. What it was that led to the total inactivity of the parties after that cause was remitted, I am not prepared to say, but the cause never came back to us. If my recollection is correct, there was great difference of opinion among the Judges in that case, and the judgment was pronounced by the narrowest majority. I think the principal case since mentioned was that of *Young v. Young*, and a very extraordinary case it is. In all the debates and arguments that were held in this House when that former case was heard, and in all the debates in the Court of Session, and until about the time the present case came up here, that case of *Young v. Young* has slept in the repositories of the Court of

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Session, and nobody seems to have known any thing of it. What the particulars of the case were, or what opinion the House might have formed upon that judgment, I cannot presume to say; but I think I do not go too far when I intimate, that if that case of *Young v. Young* had been brought by appeal to this House, it would probably have found its way to the Court of Session for further consideration, as the case I have alluded to did. It is proper, however, to observe, that the Judges appear, from passages in the printed papers, to have considered the present case with reference to the fact, that a remit had been made in the former case alluded to.

My Lords, if this case depended upon the effect of the deeds of entail only, and such principles as we apply in this part of Great Britain in the construction of deeds, we should have nothing to do but to look at the deeds; and I apprehend that it would be perfectly clear that this gentleman might sell the estate, and, selling it, that no demand could be made against him in respect of the price, nor would it be suggested that he had done that which he was not entitled to do. But we must look to the law of Scotland to determine, whether that law raises such a demand against the party as this judgment sanctions, attending to what is the acknowledged effect of this deed, which, it is admitted, does not prevent the party from selling, and to sell without limit as to the number of sales; upon each sale the party being however supposed to be obliged to buy another estate, to be settled to the same uses; a right in him to sell from time to time, and in the purchaser to buy from time to time, without limit as to the number of sales and purchases; the obligation from time to time to buy an estate, to be settled in lieu of that sold, arising either from a proviso in the deed against selling, or a sort of *jus crediti* which the heirs and substitutes are supposed to have from what is called or represented as part of the law of Scotland, independently of the words of the deed.

If such be the effect of this deed, I cannot bring myself to believe that the author of the entail had the least notion that his intention would fall to be considered as an intention that the party might sell parts of the entailed lands, consistently with the legal effect of the deed of entail, complying with an obligation supposed to arise from requisitions not sufficiently expressed in the deed, but imposed by law an obligation to buy other estates, to be entailed in lieu of those which had been sold. That this would not be according to the entailer's intention, it is difficult to doubt; but if the judgment is right, it should seem that this is an intention which the law must impute to him as his actual intention, though he has not expressed it,—must imply to have been his actual, though not his expressed intention,—not the expressed intention of an entailer, who has declared that the lands to be purchased with his personal estate should be conjoined inseparably with those his other lands, (*Ascog* and others), which he had himself actually entailed; and the deed of the entail of *Ascog* containing passages which likewise point to inseparable conjunction of the actu-

July 16. 1880. ally entailed lands with other lands required to be entailed. If the deed intended to give the power of selling, and he has expressed in the deed nothing whatever with respect to the money which arises from the sale—prima facie, at least, one should think that he to whom he had given the power of selling would have the power of disposing of the money which is the produce of the sale. It is true, that the author of the deeds has said, that the heirs shall not have power or liberty to sell, annailzie, or wadset the lands;—the other prohibitions he has guarded with irritant and resolute clauses. The effect of those clauses, if the other prohibitions were violated, is well understood. The deeds of entail apply no irritant or resolute clauses to the prohibition against selling. The deed, therefore, admits of an effectual sale; but the author of the deed, without expressing that such shall be the effect of a sale, is understood to mean that, of which he has not said one word, viz. that if the heir does sell, he shall buy another estate with the price, and so sell and buy as often as he pleases to sell and buy; and that the mode in which he is to compensate the other heirs, is not by recompensing each to the extent of the damages which each may sustain, if any of them can claim compensation in that mode, but, selling as often as the heir chooses to sell entailed estates, so often entailing other estates to be bought with the prices for which the original and subsequently purchased estates sold. It is to be argued, that though the deed has not applied the irritant and resolute clauses to the act of selling, yet there is law, not expressed in the deed, but to be found out of the deed, which sanctions and requires that which in this case the judgment requires. This has not been established satisfactorily, if I may presume so to say; but of this your Lordships are to judge. The author of the deeds seems to have made his deeds the law between the parties to take under them; and he seems to have thought that his estates, entailed by his deeds, and to be entailed by the purchases which he himself directed, were conjoined inseparably in all time thereafter. There is evidence of this in the deed of entail itself of 1763. The author of the deeds may have mistaken the effect of them, but, if he thought that he had by his own deeds irrevocably conjoined the estates which he entailed and directed to be entailed, and yet, by not applying irritant and resolute clauses against selling, has authorized sales, he has not irrevocably conjoined the estates which he meant should be so conjoined. By mistake, if it be so, he has not executed his own purpose; and it is for your Lordships to judge, whether, taking this to be a mistake, you in judgment can rectify it. Whether the omission of a resolute clause against selling was intentional or unintentional, it bears strongly, it should seem, against the judgment. The deed entailing Ascog also appears to afford evidence, that he thought that Ascog was, and that he meant it should be, inseparably conjoined with the estates entailed, or which he required to be entailed. I am resolved, he says, having designated himself John Stewart of Ascog, for the standing of

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my family, to make the settlement underwritten, with and under the conditions, burdens, provisions, conditions, and clauses irritant and resolute, herein-after expressed. There is difficulty in contending, that a man who tells us he meant to make a settlement, 'under the 'burdens, conditions, provisions, clauses irritant and resolute after 'express,' means to make it under conditions not all equally effectual. He has not expressed that he really meant—in addition to the mere words of the condition not to sell without making that condition effectual by irritant and resolute clauses affecting purchasers—that an heir effectually selling to a purchaser should be both liable to what the judgment renders him liable, and also at liberty to do what, consistently with the judgment, he is from time to time fully at liberty to do. It is for your Lordships to judge, whether clearly settled law exposes the heir selling to such liability, and nevertheless leaves him entitled to such liberty; and that you are bound to imply that the author of the entail meant to impose an express condition by the deed, and instead of enforcing the observance of it, as he enforced the other provisions by irritant and resolute clauses, that he relied upon some supposed clearly settled law to do what he might have directed by this deed, but as to which he is perfectly silent, namely, from time to time, upon every selling, to require the heir to buy another, and entail to the same uses. The entailer, Stewart of Ascog, proceeds to convey All and Hail the three pound land of Over and Nether Ascog, with the milln thereof, milln lands, multures and sequels of the same, and waulk-miln thereat, the loch Ascog, and aqueduct thereof from the said loch to the said millns of Ascog, with the 'mansion-house of 'Ascog, yards, and haill inclosures thereto belonging; then he mentions the parish church, and the place of sepulture he has there,—and he proceeds to add a great many other lands which he had. After going through the mention of the heirs called before M'Arthur of Milnton and Fullarton of Bartonholme, he limits the estates he was entailing to Archibald M'Arthur, only son of John M'Arthur of Milnton, and the heirs-male of his body; and in a subsequent limitation, on the failure of him and those who come after him, to George Fullarton of Bartonholme, only son of the deceased Robert Fullarton of Bartonholme, and the heirs-male of his body: Then he concludes with other limitations. I have mentioned these limitations to Archibald M'Arthur, the only son of John M'Arthur, and then to George Fullarton, the son of the deceased Robert Fullarton, whom he substitutes in the course of this entail, with a view of observing on a passage which occurs in the subsequent part of this deed. It appears to me important, as shewing that he meant that the very lands which he had himself entailed should be conjoined with those which he requires to be entailed with them; not only those to be purchased with the produce of his own property, but those also of Milnton and Bartonholme: For you further find in the deed this proviso, 'It is hereby expressly 'provided and declared, and shall be provided and declared in the



July 16. 1830. ' charters and infeftments to follow hereupon, that if the lands and ' others foresaid,' that is, the very lands which he had himself entail- ed, ' by virtue of these presents, happen to fall and devolve upon any ' of the heirs-male of the body of the said John M'Arthur of Miln- ' ton, in virtue of these presents, or the heirs-male of the body of the ' said George Fullarton, that then and in that case they shall be hol- ' den and obliged to tailzie, as I hereby bind and oblige them to tail- ' zie the said lands of Milnton and Bartonholme respective, upon the ' same series of heirs, and under the same provisions, clauses irritant ' and resolute, that are contained in the present tailzie, and cause ' record the said tailzie in the Register of Tailzies; and that within five ' years after the succession, in virtue of this present tailzie, shall de- ' volve upon them respectively.'

Now, my Lords, see what the object here was,—that if those persons took the lands and others aforesaid, that is, the lands of Ascog and others comprized in Stewart of Ascog's entail, then they should like- wise add to that tailzie of those lands the lands that belonged to them in the places he mentioned. But if the lands of Ascog and others, entailed by himself, could be disposed of by sale, that sale might be made effectually soon after his death, or before the succession to Ascog and others fell to those who were to entail their lands, and then the case could not arise in which the lands settled by his entail could fall and devolve upon the heirs of M'Arthur and Fullarton. I do not apprehend that it would answer the real actual intention of the author of this tailzie of Stewart of Ascog, that lands purchased anywhere in Scotland, with the money arising from a sale of the Ascog and other lands entailed by himself, should be entailed with the lands of M'Ar- thur and Fullarton. He probably meant, that inseparable conjunction of his lands with their lands which he ordained as to the lands he had, and those which should be purchased with his other property.

He had before mentioned the mansion-house, the parish church, and the place of sepulture he had there in Ascog. He directs also, that heirs-substitute are to bear the name and arms of Stewart of Ascog; that they are to keep up the parish church of Ascog. These and other circumstances denote an intention that this entailed property should remain unsold, and that he was not declaring or providing for any such purpose as would allow the heirs-substitute to part with what he had entailed, and to entail other lands by laying out the sum arising from the sale of entailed lands. I take it, my Lords, to be reason- ably clear, and I cannot but think that the party to this deed had not the least notion that the heirs-substitute might sell the entailed estates. I infer this from his having prohibited sale in terms, though ineffec- tually, adding to that consideration his extreme anxiety inseparably to connect what he had entailed with the lands which he directed to be purchased and entailed, and with his requisition that some of his heirs-substitute should entail in like manner their lands, if they suc- ceeded to his; meaning that they, when they became Stewarts of

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Ascog, should enjoy together his Ascog estates and their own former estates, under the same entail or species of entail. But whatever may be that opinion, thus expressed, judicial opinion must hold that he intended us to prevent any sale (speaking of intention, it is to be collected from his deed) which he has effectually by his deed prevented, and that only. He must be considered as not having prevented by his deed, what probably he really by mistake thought he had prevented, viz. sale of his entailed estate; and accordingly the Court of Session all agree that a purchaser may buy the estate, and, buying it, destroy all that union and conjunction of estates which he meant to secure, and seems to have been most anxious to secure. His mistake, if there has been a mistake, it is difficult to say that a Court can correct; but it may be said, that though buying the estate is an act permitted to the purchaser, because not sufficiently prohibited by the terms of the deed, it is (somehow only conditionally) allowed, if not actually prohibited as to the heir-substitute selling,—that he has accepted upon terms which he is under obligation to comply with,—that he can only sell upon condition that he lays out the money arising from the sale in the purchase of other lands, to be settled to the same uses,—and that, observing such a condition, he may sell and repurchase lands as often as he pleases, making from time to time similar entails: that such is the state of the law ‘inter hæredes;’ that, as to heirs, there is a sort of *jus crediti*, a sort of obligation, that they should so act with respect to each other; and that the author of this deed of entail must, as to his intention, be supposed to mean not only what he has expressed in the terms of his deed, but something which the law requires,—not to be found in the expressions of the deed, but which nevertheless the law does require,—the benefit of which he must have meant his heirs-substitute to have, though he said nothing in his deed respecting it; and that he must be taken to mean that his heirs should have the advantage of that law, though he has not so declared.

One great difficulty in this case, as to this, seems to be of this nature,—that if you impute to the author of this deed, that he meant both what this judgment says is the law which the heir is to observe, and that he meant also to effect all that has been stated to be the meaning of what he has actually directed, expressed, and declared to be his meaning in the expressions of, and in what he requires to be done by his deed, as to conjoining indifferent properties inseparably, it is difficult, and perhaps it may be most reasonably said it is impossible, to reconcile the expressed and implied meaning with each other; and that, whatever may be said to be the intention of an entailer, as to be collected both from the expressions in his deed and by some law not mentioned, but some law supposed to be settled and intended by him to be observed, it seems exceedingly difficult, if not impossible, to suppose that this entailer,—regard being had to the expressed provisions in his deed with respect to the lands which he entailed, and those which he directed to be entailed, and which he required to be

July 18. 1880. inseparably conjoined, and those which he seems to have required some of the heirs-substitutes to add by entail to his entailed lands,—it seems difficult, if not impossible, to suppose that he thought that any law, not expressed in his deeds, would sanction the sales of the entailed estates, if the money produced by such sales was laid out in the purchase of any lands anywhere in Scotland, to be sold and exchanged, again and again, for any other lands there. His intention seems to have been, that his deed was to regulate the whole; he seems to have thought, that by this deed he had prevented sale of the entailed estates. In that he has been mistaken: the defect of the deed it is difficult to supply by that judgment which is under your Lordships' consideration, unless it can be made out to your Lordships' satisfaction, that that judgment pronounces the law of Scotland upon the effect by expression, or some settled doctrine of law with reference to which the entailer made his settlements, though in his settlements he refers not to that doctrine.

I cannot easily persuade myself to think, that either the party to this deed, or his professional adviser, really thought of giving efficacy to some parts of this deed by penalties and forfeitures, and to the most material part, as to selling, by prohibitions only, which are ineffectual as to forfeiture of the estates, and leave the heirs, in case of sale, to a remedy in damages, reparation, or surrogation, or by what other name the party selling, and the other substitutes, could agree to apply to recompense for the act done, if agree they could.

Let us shortly again observe, that the question in this case which we have to determine is, not whether there has been a breach of obligation entitling the heirs-substitute to recover damages, estimated and calculated by reference to what loss every and each of the heirs-substitute may sustain by sale of any of the entailed lands; but whether it is the law, that, if a sale is made, the price should be laid out in lands in like manner, such lands when bought being again liable on like terms to be sold, sale and reinvestment to be following each other as long as the heirs shall think proper to make sale and reinvestment; the liability to damages, to be calculated for the benefit of each and every one of the heirs in manner mentioned in the summons, taking place according to that summons in the event of the parties not reinvesting the price in the purchase of other lands, upon which question of eventual liability to such damages, the Court in judgment I understood to have expressed no opinion. The question, therefore, before us is simply, whether the party is compellable by law to lay out the price or prices of what has been sold in the purchase of other lands? and, if I understand the judgment, the Court has not proceeded to state any thing respecting what is demanded as damages if reinvestment is not made. The Court declares, indeed, that the defender is not entitled to apply the principal sums of the prices or considerations for his own benefit. The actual circumstances of the case made it possibly unnecessary to express any judgment as to what

should be done, if the defender had applied or should apply the price to his own benefit. If a case of this sort happened, as it might have happened, it might have been exceedingly material for your Lordships' information to have learnt how damages would have been estimated as to all, each, and every one of the heirs-substitute born, or hereafter to be in being. July 16. 1830.

To estimate damages in such a case, in such manner as damages are asked, does not seem to be obviously just, assigning as damages to each heir the whole extent of price.

To proportion the damages amongst all heirs, seems to be matter of difficulty not easily overcome. It may not be improbable altogether, that if the price had been wholly applied to the defender's own use, he might have been held liable to invest, in the purchase of other lands, money to the amount of the price. As to this proposition also, there are difficulties attending it of weight; but it is probable that the Court might have held this.

I own, my Lords, I am unable to persuade myself, that by a mixture of law not to be found in the deed, but of law understood to be settled, with the provisions of the deed,—(the act of selling is a legal act—the act of buying is a legal act),—that the act of selling can neither be prevented by interdict, inhibition, forfeiture, or other means, but yet that the heirs-substitute are to take their chance of having the sale prevented, not by a real obligation preventing it, but by a personal obligation to lay out the price for which the sale is made in the purchase of other lands, to be sold again and again upon reinvestment of prices; and particularly when regard is had to what appears to be the meaning of this entail as to what were the very lands which he means to entail.

Your Lordships have had a great deal of discussion at the bar as to the state of the entails prior to the statute of 1685, and even discussion, whether there were any valid entails before that statute. It seems impossible to deny that there were entails before that statute. We read of simple destinations,—of the introduction of prohibitory clauses,—irritant clauses,—resolutive clauses,—into entails. In the course of what has passed here, we have heard of Acts of Parliament recognizing entails prior to that statute. We have heard of the use made of inhibitions and interdicts, as it should seem longer in use, than it is now thought consistent with that statute that they should have continued in use.

We have been referred to text writers, to dicta, to authorities, unquestionably of great weight, imputing, in effect, that there were valid entails, at least valid inter heredes, before the statute, and to the Stormont case. Let it be assumed, therefore, that there were valid entails before the statute. It is also not capable of being denied, that much and weighty authority has been referred to, for the purpose of maintaining that the statute was also intended only for the benefit of purchasers, creditors, &c., and that it was not intended to

July 16. 1830. operate so as to authorize, especially if there was a prohibitory clause, some of the hæredes to disappoint the expectations of the other hæredes; but as between heirs, the entails, though defective as to others, created obligations, personal if not real, capable of being enforced somehow. It is difficult under such circumstances to undertake to pronounce, that it was the intention of the statute, with respect to entails made after that statute; to enact that the question of their validity should depend merely and only, as between all persons, upon their conformity to that statute. So, often, it has been declared by great and grave authorities, that such was not the intention of the statute as between heirs. The history of decisions, perhaps, authorizes an assertion, that it is also however very difficult to state, what is the remedy which the heirs-substitute were meant to have against heirs violating a prohibition not enforced by irritant and resolute clauses, especially considering what is now stated to be the law as to inhibition and interdict? which seems to prove, that those who maintain the obligation or duties between heirs-substitute, must admit that the statute meant to take away, and has taken away, some of those means of preventing a breach of these obligations or duties; and it seems not to have been clearly or to be easily settled, what are precisely the remedies established by law, in case of a breach of such obligation or duty.

If the authority I refer to did not lead me to abstain from confidently stating that opinion, I should have said that the language of the statute 1685 satisfied me, that it was the intention of the Legislature to make this statute apply to all future entails at least, and that the statute was to regulate them. It is in these terms:—‘ Our Sovereign Lord, with the advice and consent of his Estates of Parliament, statutes and declares,’ (not that it is lawful to his Majesty’s subjects, but) ‘ that it shall be lawful to his Majesty’s subjects to tailzie their lands and estates, and to substitute heirs in their tailzies, with such provisions and conditions as they shall think fit, and to affect the said tailzies’ (having made their tailzies with such provisions as they think fit) ‘ with irritant and resolute clauses, whereby’ (that is, by those irritant and resolute clauses) it shall not be lawful to the heirs of tailzie to sell, annailzie, or dispone the said lands, or any part thereof, or contract debt, or do any other deed whereby the same may be apprized, adjudged, or evicted from the other substitutes in the tailzie, or the succession frustrate or interrupted; declaring all such deeds to be in themselves null and void, and that the next heir of tailzie may immediately, upon contravention, pursue declarators thereof, and serve himself heir to him who died last infeft in the fee, and did not contravene, without necessity any ways to represent the contravener. It is always declared, that such tailzie shall only be allowed in which the foresaid irritant and resolute clauses are insert in the procuratories of resignation, charters, precepts, and instruments of sasine, and the original tailzie

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‘ once produced before the Lords of Session judicially, who are here-  
 ‘ by ordained to interpone their authority thereto, and that a record  
 ‘ be made in a particular register book to be kept for that effect,  
 ‘ wherein shall be recorded the names of the maker of the tailzie, and  
 ‘ the general designations of the lordships and baronies, and the pro-  
 ‘ visions and conditions contained in the tailzie, with the foresaid ir-  
 ‘ ritant and resolute clauses subjoined thereto, (the tailzier stating  
 ‘ his own conditions and provisions, and inserting his irritant and re-  
 ‘ solutive clauses), ad perpetuam rei memoriam; and which provisions  
 ‘ and irritant clauses shall be repeated in all the subsequent convey-  
 ‘ ances’ (this part of the statute does not mention resolute as well  
 as ‘ irritant clauses,’ but there can be no doubt I apprehend as to the  
 intention) ‘ of the said tailzied estate to any of the heirs of tailzie;  
 ‘ and being so insert, his Majesty, with the advice and consent afore-  
 ‘ said, declares the same to be real and effectual, not only against the  
 ‘ contraveners and their heirs, but also against their creditors, ap-  
 ‘ prizers, adjudgers, and other singular successors whatsoever, whe-  
 ‘ ther by legal or conventional titles.’ Then it is declared, ‘ That if  
 ‘ the said provisions and irritant clauses’ (that is, such as had been in-  
 serted originally) ‘ shall not be repeated in the rights and conveyances  
 ‘ whereby any of the heirs of tailzie shall brook or enjoy the tailzied  
 ‘ estate, the said omission shall import a contravention of the irritant  
 ‘ and resolute clauses,’ (not only of the irritant, but the irritant and  
 resolute clauses), ‘ against the person and his heirs who shall omit  
 ‘ to insert the same, whereby the said estate shall ipso facto fall, ac-  
 ‘ crue, and be devolved to the next heir of tailzie; but shall not mili-  
 ‘ tate against creditors and other singular successors, who shall hap-  
 ‘ pen to have contracted bona fide with the person who stood infeft  
 ‘ in the said estate without the said irritant and resolute clauses in  
 ‘ the body of his right.’

The language of this statute seems therefore to import, that the  
 Legislature was not only ordaining a law for the benefit of creditors  
 and other singular successors, but also a law which was to operate  
 between and for the benefit of heirs; and in its language also to re-  
 quire certain observances, a non-attention to which should affect the  
 right of heirs, though not the rights of creditors or singular successors;  
 and this occurring in an Act of Parliament which ordains how it shall  
 be lawful for his Majesty’s subjects to tailzie their lands.

It surely is not very presumptuous to say, that it is difficult to sup-  
 pose that the Legislature, thus providing the most effectual means  
 that could be devised for protecting future heirs-substitute against  
 the acts of prior heirs-substitute, and adopting such language as is  
 adopted in this statute, might not feel the necessity, with respect to  
 entails thereafter created, for any other provisions of law in favour of  
 heirs-substitute than such as were in the statute expressed; or that if  
 a person set about making an entail, he was in want of any other  
 means of enabling him most effectually to complete his purpose, than

July 16. 1880. such as this statute afforded him. It seems to me that he might lay aside all intention to take the benefit of the Act of 1621, if indeed it can be said that that Act has any application to the subject, or to take the benefit of any preventive processes, or any remedial suits which the law, before this statute passed, furnished against violations of his entail. Some of these preventive remedies, we have been told, inhibition, &c. were for a time, but only for a time; understood to be applicable against a party intending to sell, and not restrained from selling by irritant and resolute clauses; and the judgment in question negatives the right to prohibit the sale. Statute law, we have been told, has not ascertained what is the remedy, the precise nature of the remedy, which the substitute-heir has against a prior heir having a right to sell, being under no real, but supposed to be under some personal obligation not to sell,—an obligation which cannot be enforced, as we have been told it cannot, as a real obligation might have been enforced before the statute.

In the absence of statutable remedy, some have told us, that for the breach of personal obligation damages are recoverable; by whom, in what manner to be estimated as to each and every person who may be damnified, we have not been told in argument or statement, except as we find damages in a given case stated in the summons. We are told, that what the appellant calls damages is not damages but reparation. We are told, that it is neither damages nor reparation, (indeed it is difficult to distinguish the one from the other), but that the price for which the entailed estate is agreed to be sold is a surrogatum for the estate sold—not, however, to be enjoyed according to the species of property of which that price consists, but to be laid out in land, with an uncontrollable power in the heir-substitute for the time being to re-sell and re-purchase, as often as re-sale and re-purchase shall according to his pleasure be made; and, unless I mistake the effect of the information we have received, the remedy ordained to be due by this judgment, is a remedy hitherto not awarded in judgment in such a case as this.

But, whatever be the right opinion as to the effect of the statute of 1685, with respect to entails created before that Act, or since that Act, I cannot bring myself to think that this entailer, executing a deed in all its contents such as this entail is, has created such a right (as between the heir in possession and the other heirs-substitute) as this judgment affirms that heirs-substitute possess, or are adjudged to have by the application of the price which it ordains to be made.

The doctrine of non-implication, as applied to Scotch entails, may have gone a great deal too far. I think it has; but it must now be supported. That we are to contend that it was in the contemplation of the author of this deed, that each heir-substitute might sell; that every person that would deal with him might buy; that though he had a right to sell, and every such person a right to buy, yet that, after he had so sold, he was under an obligation, perfect as being capable of

being enforced, to lay out the price in the purchase of another estate, July 16, 1830. and so toties quoties;—to suppose all this, attending to all that in provision and expression is found in the deed as to the estates which he entails, seems, if not to be considered as construing by implication, to be liable to objections of the same nature as implication is exposed to, or at least liable to them in a considerable degree—as will open to others which we have heard in the arguments, and read in the papers in this case. It amounts in its possible effect to this, that an entail of these lands, which Stewart of Ascog seems to have been determined that future Stewarts of Ascog should possess at Ascog and elsewhere, conjoined by his deed inseparably in all time coming, might in process of time, according to law, so operate to make these heirs, heirs under a tailzie which had ceased to affect any of those lands, and which comprehended different property in every or any other part of Scotland. Looking at the whole and every part of this deed, I cannot but think that the party meant to make a strict entail of the lands under the authority of the statute; that his purpose was as effectually to guard against sale as against the breach of his other prohibitions; but through mistake of himself or his man of business, he omitted necessary clauses as to the act of selling. If it was a mistake, perhaps it was more likely in 1768 not to have been thought such, than it might have been after some decisions respecting entails subsequently made.

At any rate, my Lords, I cannot bring myself to think that law, written or unwritten, has been brought before us, to authorize us to adopt, on the consideration of the rights of the heirs-substitute as amongst each other under this deed, that judgment which has been pronounced in the Court of Session; which in truth amounts to the gift of a power to every heir to sell and exchange lands as oft as he pleases, in despite of an ineffectual proviso entailing from time to time any other lands which he may prefer to those which had been originally entailed upon him, and in the meantime keeping the money for which he sells the original lands under a species of entail, or something like an entail, either in his own possession, or that of a Court, if diligence can get it out of his hands into the possession of a Court. For such a former decision as matter of authority I have inquired—I have asked whether the bar could furnish any; but we have been referred only to what are mentioned in the Cases on your table.

I have not been able to satisfy myself, that if damages, reparation, compensation, or surrogatum, can be called for after the statute 1685, if the entail is not complete according to that statute, that this judgment in this case can be supported.

My Lords, I have before said, that it is not my purpose to consider the various arguments to be found in former cases in the papers printed in this and former cases; the arguments now and heretofore urged at your bar in this and former cases; or in the very learned opinions stated in what has been brought before us in point as the opinions of the learned Judges in this or former cases;—all have been with me



July 16. 1830. subjects of most anxious consideration, as I doubt not they have been with all such of your Lordships as have attended throughout the hearing of this cause. It is a painful duty, my Lords, to express an opinion touching a doctrine, with respect to which so many learned, able, and experienced Judges have differed in opinion. It is a duty, however, which must be discharged; and because it must be discharged, I find myself obliged to state to your Lordships, that I agree in this case with the minority of those very learned Judges, in thinking that this judgment of the Court of Session cannot be sustained. I pass over also the dicta and cases that have been cited to your Lordships, and which are all observed upon in the papers upon your table very fully.

Bound to assist your Lordships in giving judgment in this case, I have stated my opinion. If I should happen to differ with my noble and learned friends, or other Lords who heard the cause, I can only say, that, because it was my duty to state my judicial opinion, I have troubled your Lordships by stating it; most cheerfully submitting to whatever may be the opinion of the House.

LORD WYNFORD.—My Lords, I entirely concur in all that has been said by my noble and learned friend; and after the very elaborate judgment that he has pronounced, it will not be necessary for me to trouble your Lordships at any length. By the law of England, an estate can only be entailed for the lives of persons who are in being, and until some one that is at the time of the making of the entail-unborn shall attain the age of twenty-one. This rule of our law would be easily defeated, if the settler of an estate might impose a condition, that, if the person on whom an estate was settled sell the estate, that he should be a trustee of the proceeds of the sale of such estate for those to whom the estate would have descended if the entail of it had not been barred.

Our Courts held, that such a condition was against the policy of our law, and on that account void; and although a tenant in tail took an estate with such a condition annexed to the grant of it, he might bar the entail, sell the estate, and do what he pleased with all the proceeds of the sale, without being in any manner accountable to those who would have succeeded to the estate.

By the law of Scotland, an estate may be continued in the line or lines designated by the settler, so long as any of those lines are in existence, if the deed of entail be in conformity with the statute of 1685, and the prohibitions which it contains be guarded by irritant and resolute clauses.

I doubted whether, considering the difference between the laws of England and Scotland, although void in England, it might not in Scotland create such a moral obligation, that the person who accepted the estate on that condition, would be obliged to reinvest the money for which it was sold in the purchase of other lands, to be held for the benefit of those who were the objects of the settler's bounty. An

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apprehension that the habits of an English lawyer might lead me into a train of reasoning not warranted by Scotch law, according to which your Lordships are to decide the question submitted to your judgment by this appeal, occasioned this doubt. Your Lordships will not be surprised, that I should pause in a case in which there has been so great a difference of opinion in the Court below ; but I protest against what has been said in another place, namely, that English lawyers are not competent to advise your Lordships on a question of Scotch law. As well might they say, that one who had studied logic in Edinburgh would not be able to reason on any question of morality or policy that arose in England, although in possession of all the circumstances connected with the case to be discussed. One who is acquainted with the general principles of jurisprudence, and has been in the habit of investigating legal questions, of interpreting written laws, and weighing the authorities on which unwritten laws depend, will be fully competent to decide points arising under the laws of any country. Such a person would make up for his want of familiarity with the subject brought before him, by the additional caution and attention which the novelty of the case would naturally excite. If he has not so much knowledge of the subject as Scotch lawyers may have, before he has heard and considered the arguments and authorities, he will decide on such as are adduced without any preconceived prejudice. If I am wrong in this, our Government withholds from our colonies the greatest advantage that those colonies have to expect from their dependence on it, namely, a just administration of the laws of each colony ; for a single English lawyer decides, at the Privy Council, cases arising under almost every system of law that prevails in the world. I have devoted much of my time and attention to this case, and, in the consideration of it, I have forgotten that I was ever connected with English judicature. I have formed my opinion on Scotch authorities only.

I have no doubt that the printed Cases, and the arguments at the bar, have furnished us with all the authorities that bear on the point to be decided. Since I have had the honour of assisting in Scotch appeals, I have always found that the talents, the learning, and industry of the Scotch bar, have given, in the best and clearest manner, all the information that this House can require for the decision of any question submitted to its judgment. My opinion is formed on grounds taken by a learned Judge in the Court below:

Lord Cringletie in his excellent judgment says, ‘ A prohibition is a mere restraint, and does not constitute any obligation whatever either in law or equity.’ I agree with Lord Cringletie, that an imperfect prohibition, as that not to sell in this case, constitutes no obligation either in law or equity. It raises only one of those imperfect obligations which no Court of law could enforce: it can create no such trust as any person can be compelled to perform ; and it is admitted, that there is nothing to prevent the owner from selling the estate,

July 16. 1880. neither is there any thing that prevents him from making what use he pleases of the proceeds of the sale. Where there is a legal right, there must be a complete legal remedy. There is no legal means of securing this supposed right to have the purchase-money reinvested, or in any manner used for the benefit of those who, according to the order of succession, would have become entitled to the estate if it had not been sold. If you cannot prevent the person in possession from selling the estate, and getting the proceeds of such into his possession, and cannot impound the money whilst in his hands, you can have no sufficient remedy for the securing such money; for the vendor will get rid of the money, and a personal action against him, after the acts are done, will be more expensive than profitable. It is admitted, that the vendor cannot now be restrained from selling by an inhibition. The judicature of Scotland would be defective, if those who would succeed to the estate have a right to the proceeds of the sale of the estate, whilst they can have no inhibition to restrain the owner from selling until he has given security duly to apply the purchase-money. There is no instance where a party may be remediless after an act is done, in which the law will not give him the means of preventing its being done, until he is completely indemnified against the consequences. If your Lordships will attentively consider the statute of 1685, c. 22. you will perceive that, in this case, the vendor can be under no obligation to reinvest the proceeds of the sale of the estate. That statute forms the law of entails now in force in Scotland. If there is nothing in it which ties up the proceeds of the sale of an estate, the vendor must be at liberty to dispose of them as he pleases.

Now, according to this statute, an estate, and every thing belonging to it, is at the disposal of its owner, unless the person who has conveyed it to him has restrained his power of disposing of it in the manner prescribed by it. It is not unreasonable, that a man should be permitted to preserve his estate for the benefit of persons for whose welfare he may feel an interest, as, for instance, for the unborn children of the settler's children, or of those who are the immediate objects of his bounty: But there are few countries in which property is allowed to be continued in particular families, for the vain purpose of preserving a name; and Lord Cringletie tells us, that in Scotland an entail is strictissimi juris tolerated by the law under certain conditions. Property, therefore, is free from the entails, unless the law imposing such fetters is fully complied with.

The Scotch statute of entail says, that it shall be lawful to tailzie lands and estates, and to affect the said tailzies with irritant and resolutive clauses, whereby it shall not be lawful to the heirs of tailzie to sell, annailzie, or dispoise the said lands, or any part thereof. The word 'whereby,' in this passage, (which refers to irritant and resolutive clauses), shews, that these only prevent the sale or other disposition of an estate. That no other tailzies have any effect, either with regard to an estate or the price of it, is clear from the following

words: 'Such tailzies shall be allowed in which the foresaid irritant and resolute clauses are insert.' July 16. 1880.

If no tailzies are allowed which have not these clauses, tailzies that are without them can have no effect whatever. But the statute contains these other words: 'And being so insert,' (that is, these clauses being insert in the various instruments necessary to complete an entail), 'his Majesty, with the advice and consent foresaid, declares the same to be real and effectual, not only against the contraveners and their heirs, but also against their creditors, comprisers, adjudgers, and other singular successors whatsoever.' The words, 'their heirs,' answer the argument that has been addressed to your Lordships, to prove that irritant and resolute clauses, and the registration of the deeds containing them, were intended only to protect purchasers and creditors; and that an entail would be effectual against heirs without them. Without these clauses there is no real or effectual obligation on any one, and the prohibiting part of the deed is entirely inoperative. The judgment of the Court below admits the inefficacy of the prohibition as to the estate, but holds it obligatory on the proceeds of it. According to this decision, the object of the Legislature in passing the law of entail, was only to prevent a change of the lands settled; the settler having a right, independent of this statute, to tie up the value of those lands. Such an object would be hardly worthy of the interference of the Legislature; but the rendering it more difficult to keep property out of the market, has been considered as good policy in Scotland as well as in England. Where the words of a statute are clear and intelligible, a series of decisions, from the time of its becoming law down to the present hour, would not authorize your Lordships, sitting judicially, to give a judgment inconsistent with it. Where a law is doubtful, decided cases may assist your Lordships in putting a construction upon it; but where there is no ambiguity in a statute, your Lordships will take the law from the Legislature, and not from Courts of Justice. Your Lordships will however find, that the balance of authority supports the construction which I humbly recommend your Lordships to put upon this case. The latest decision upon this point is opposed to the judgment of the Court below. The Judges who pronounced that decision had under their consideration all the previous cases, and it was pronounced when the spirit of the statute of 1685 was better understood than it had been in old times. Sir Thomas Hope and Sir George Mackenzie seem to consider the irritant and resolute clauses as substitutes for the remedy by inhibition, and as intended to save the trouble and expense of that diligence. Lord Stair considers restrictions, without the addition of irritant and resolute clauses, as mere personal obligations. Erskine makes the same observations on such restrictions. The opinions of these learned writers would, if unopposed by any authority of greater weight, be entitled to much consideration. But to these opinions are opposed the judgment of a Court, and the still higher authority of the

July 16. 1830. Legislature, expressed in the statute of 1685. Indeed, the commentator on Lord Stair does not seem to be satisfied with his Lordship's opinion; for he has introduced another very important condition, not found in the text of Lord Stair, nor in the works of the other writers, nor in the deeds now under consideration, namely, 'and that all deeds shall be null and void.' Lord Kames says, 'Justice permits no man to take the benefit of a deed, without fulfilling the provisions and burdens imposed by the deed.' This observation is correct, if it be considered as applicable only to legal provisions and burdens; but the prohibition in this case is not a legal provision, and, therefore, there is no legal obligation to comply with it. Whatever opinion moralists may entertain in such a case, Courts of Justice know of no obligations except such as are allowed by law. There are many cases in which, considering only the individuals concerned in them, promises and conditions that have been made in such cases ought to be performed, but in which the policy of the law, looking to the general welfare of the community, will not permit the performance of such conditions or promises to be enforced. It is the policy of the law to prevent the accumulation of property, and the perpetuating the possession of it in families. Acting on that policy, the Legislature has said, that an estate shall not be entailed, so that it cannot be sold, but in a particular manner. No man can bind himself, either by an implied or expressed promise, not to sell his estate, unless that promise be in the form, and accompanied with the sanctions, specified by the law. The old cases to which your Lordships have been referred, were decided before it was settled, that one, who stood in the order of succession, could not have an inhibition to restrain the person in possession of a tailzied estate from selling or encumbering it. It was, however, admitted to be law, before the case was decided to which I shall presently have the honour of referring your Lordships, that an inhibition could be obtained under such circumstances. The case of Bryson and Chapman had indeed gone further, and had established, that an inhibition obtained on a prohibition to sell, would not prevent the party inhibited from making a good title to the purchaser of his estate. It has been attempted to weaken the authority of this decision, by shewing that Lord Kames differed from the other Judges, and that there was a reservation in it to A, to insist in an action of damages against B, when his right should take place by the succession opening to him. These words only prove, that the majority of the Judges confine their decision to the point raised for their judgment, and would give no opinion on what those who should be Judges when this case might come before the Court again in a different shape, ought to do. A few years after this decision, the case of Lord Ankerville against Saunders and others was decided by the Court of Session. It has been attempted to distinguish that case from the present, because the obligation not to sell, in that case, was contracted by the party himself, and not, as in the present, created by the settler of the estate. But this circumstance

makes no difference. The assent of the person in possession of the estate to the prohibition in the deed conveying it to him, implied by his taking the estate, was considered as constituting the obligation on him to observe that prohibition. He is bound, therefore, by his own contract only, in the one case as well as in the other : and, unless an implied obligation has a different effect from one that is expressed, the cases are precisely the same ; the decision in that case governs this, and shews that, unless the restriction be guarded by irritant and resolute clauses, it is wholly inoperative. This is the last case, except one, in which the judgment was appealed from, and which does not appear to have ever been finally decided, in which the point was ever much considered by any Court. If the decisions of Courts of law could outweigh the authority of a statute, there is not on this point such an uninterrupted series as should prevent your Lordships from looking at the statute, and putting your own construction upon its terms.

I might safely rest my opinion on the broad ground on which I have put it ; I will add, that I can discover no evidence that the settler intended to restrain the sale of this estate. If he had this intention, he has not expressed it, and your Lordships may apply to the case the maxim, *quod voluit non dixit*. It would be a dangerous precedent, if your Lordships were to supply this want of a provision for the regulation of his property. It is not within the province of a Court of Justice to make conveyances perfect : you are to take them as they are, and to put such a construction on them as the terms of such conveyances will warrant. Courts of Justice supply defects in conveyances in favour of wives, children, and creditors ; but these are excepted cases. A lawyer looking at this instrument will be bound to say, that the settler could not mean to restrain the person in possession from selling the estate. It is a general maxim, *expressum facit cessare tacitum*. The settler has prevented the person in possession, by irritant and resolute clauses, from doing certain acts, but he has not used the same means to prevent the person in possession from selling this estate. In the case of Gordon the Judges say, ‘ that ‘ all presumptions drawn from implied intention are to be rejected ; ‘ that fetters are not to be raised on inferences, nor extended by analogy from cases expressed to cases not expressed, however similar ; ‘ and that no effect is to be given to intention, unless expressed in ‘ clear terms.’ Your Lordships will overrule every syllable of this opinion of the Judges of Scotland, if you support the judgment appealed against. You will act on the presumption of implied intention, without any evidence to raise such presumption, instead of rejecting it if it were raised. You will raise fetters for this estate on inferences extended by analogy from cases expressed to cases not expressed. Lastly, you will give effect to a supposed intention, no such intention being expressed in terms either clear or ambiguous.

I have not kept the promise that I made to your Lordships in the

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July 16. 1830. commencement of my address, and I am afraid that I have troubled you too long; but I felt, as I proceeded in my argument, the importance of the case in which I was offering to you my humble advice. I perceived that your decision would affect the whole of the landed property in Scotland, and I became anxious to explain myself fully and distinctly. For these reasons, and for those which have been so ably given by my noble and learned friend, I concur in the motion which he has submitted to your Lordships, that the judgment of the Court below should be reversed.

**LORD CHANCELLOR.**—My Lords, After the very full discussion which this case has undergone on the part of my noble and learned friends, I do not feel it to be necessary or proper to enter at large into the consideration of it; and I shall therefore trespass only for a few minutes on your time, in stating shortly the grounds upon which I think this judgment ought to be reversed.

This was an entail created in the year 1763; and, in considering the deed, it is obvious that the party who prepared it did so with reference to the statute of 1685. It is an estate tail, created plainly with reference to that statute. It is declared by the deed, that the heirs of entail shall not have any power or liberty to sell, annailzie, or wadset the lands contained in this entail.

The irritant and resolute clauses, however, do not extend to the whole of that prohibition. They do not extend to the prohibition against selling. The consequence of this is, that, by the law of Scotland, as settled by the decisions of the Courts of that country, and as confirmed by the decisions of your Lordships' House, the heirs of entail cannot be prevented from selling the estate. From the nature of the estate, the heir has the power of sale, and a mere prohibition to do that which is authorized by the very nature of the estate, must be considered as altogether idle and inoperative.

But, my Lords, it has been argued, that, from the prohibition against selling, a condition must be implied. Now, what is the condition which it is said must in this case be implied? A condition that the money shall be reinvested in the purchase of another estate, to be settled, according to the English phrase, to the same uses. No person reading this instrument, and referring to its provisions, can suppose that such a condition ever entered into the contemplation of the party by whom it was framed or executed. Not only is this so, but, according to the rule of law which has been established with respect to instruments of this kind, nothing can be implied;—whatever condition or restriction is meant to be imposed, must be stated in express terms. We are not entitled, therefore, considering the nature of the instrument, to ingraft upon it the condition which has been suggested.

But, my Lords, in addition to this, many inconveniencies and absurdities have been pointed out by my noble and learned friend, upon

which it is unnecessary for me to make any detailed remarks. A new July 16. 1830.  
 estate is to be purchased—that estate is to be settled in the same form—and, as soon as the conveyances are executed, the party has a right again to dispose of that estate; and that to go on without limit. But there is an alternative prayer in this summons, as has been also remarked by my noble and learned friend, viz. that if the defender does not reinvest the purchase-money in the manner proposed, that he should be declared liable to make compensation in damages. Upon this part of the case it may be sufficient to say, that the learned Judges below have given no opinion; but it may be asked, at whose suit is an action for damages to be instituted? Is it to be at the suit of all the substitutes who happen to be in existence at the time, or at the suit of the first substitute, or at the suit of each of the substitutes as they happen successively to come into existence? And if, after damages have been recovered, a prior heir of entail should appear, which may be the case, is the party who recovered the damages to be called upon to account for what he has received; and if so, in what manner, and to what extent? Your Lordships will recollect, that my noble and learned friend repeatedly put questions directed to some of these points to the Counsel at the bar, but to which he received no satisfactory answer. I do not, however, rest my opinion upon this view of the case; but these difficulties and entanglements fortify the judgment I have formed upon the grounds already stated, viz. that a simple prohibition, inconsistent with the nature of the estate, is altogether inoperative; and that from such a prohibition no condition (to say nothing of the assumed condition suggested in this case) can be implied.

My Lords, there are two cases which have been referred to, the case of Strathnaver, and the case of Pitlurg, to which I will just advert. I have considered the observations made upon these cases, as well by the learned Judges in the Court below, as by the Counsel at your Lordships' bar, and I am led to the conclusion, that they ought not to govern your Lordships' judgment in the case now under your consideration. I feel justified in this conclusion, not only by the observations and arguments to which I have adverted, but from this consideration, that when the case of Westsheels was argued at your Lordships' bar, it was referred back to the Court of Session by your Lordships, on the ground, that the question had not been concluded by any previous decision.

I am of opinion, then, and humbly take leave, with due deference to the Court below, to express that opinion, fortified with the concurrence of my noble and learned friends, that this judgment ought to be reversed.

The House of Lords accordingly ordered and adjudged, 'that the interlocutors complained of be reversed.'



July 16. 1830. *Appellant's Authorities*.—3. Ersk. 8. 24.; 1. Ersk. 7. 22.; 8. Vesey, 87. Bryson, Jan. 29. 1760, (15,511. and 5. Brown's Supp. p. 941.) Lord Ankerville, Aug. 8. 1787, (7010.)

*Respondents' Authorities*.—Baillie, July 11. 1734, (15,501.) Gardner's Creditor, Jan. 27. 1744, (15,501.); Hope's Min. Pr. 16. § 9. &c.; 2. Mack. 490.; 2. Stair, 3. 59.; 3. Ersk. 8. 23. Willison, Feb. 26. 1724, (15,369.) Strathnaver, Feb. 2. 1728, (15,373.; and Craigie and St. p. 32.) Gordon, July 29. 1761, (15,513.) Sutherland, Feb. 26. 1801, (No. 8. App. Tailzie.) Lockhart v. Stewart, June 11. 1811, (F. C. remitted.) Earl of Breadalbane, June 12. 1812, (F. C.) Young, Dec. 7. 1705, (15,483.) Hay, Feb. 9. 1753, (15,603.) Earl of Wemyss, Feb. 28. 1815, (F. C.) Young, Nov. 13. 1761, (5. Brown's Supp. 684.) M'Nair, May 18. 1791, (Bell's Cases, 546.)

MONCREIFF, WEBSTER, and THOMSON—SPOTTISWOODE and ROBERTSON,—Solicitors.

No. 33.

JAMES CARSTAIRS BRUCE, Appellant.—*Solicitor-General*  
(Sugden).—*John Campbell*.

THOMAS BRUCE, Respondent.—*Brougham—Lushington*.

*Entail*.—Held, (reversing the judgment of the Court of Session), that an entail containing prohibitory and irritant clauses, but no resolute clause against selling, does not create an obligation on the heir selling to reinvest the price in other lands.

July 16. 1830.

2D DIVISION.  
Lord Mackenzie.

THIS case involved, besides another point, the same as that which occurred in the preceding one.

On the 16th of February 1683, Sir William Bruce of Kinross executed an entail of the lands and barony of Kinross in favour of himself and a series of substitutes. In virtue of this entail, which was duly recorded, James Bruce Carstairs (the father of the appellant) succeeded; and the estate being greatly burdened with debts, he obtained an Act of Parliament for selling it. By this Act it was inter alia enacted, 'That in case a balance shall remain of the price of the said estate and barony, or of such part or portion thereof as shall be sold under the authority of this Act, after defraying the expenses of passing this Act, and of all reasonable expenses which may be incurred in carrying this Act into execution, and after payment of all debts, which shall be ascertained in manner hereupon directed, the Judges of the Court of Session are hereby empowered and required to direct and order that the said balance shall be laid out and employed in the purchase of other lands, which shall be limited and settled to the same persons and uses, and under the like prohibitory, irritant, and resolute clauses, as the said estate and barony of Kinross now stands limited and settled by the foresaid deed of entail exe-

'cuted by the said Sir William Bruce, bearing date the 16th day      July 16. 1680.  
'of February in the year 1683.

The estate was accordingly sold; and there being a reversion of about L. 25,000, the estate of Tillycoultry was purchased at the price of L. 24,000, and thereupon a disposition agreeably to the original entail was executed in 1783. By this deed it was provided, ' That it shall be nowise leisom or lawful to the said ' James Bruce, or any of the heirs of tailzie and provision above ' written, succeeding in the right of the foresaid lands and estate ' by virtue of the foresaid tailzie and substitution, and of these ' presents, or any of them, to sell, anailzie, dispone, dilapidate, ' or put away the foresaid lands and estate, nor any part nor ' portion thereof, nor to break, innovate, or infringe this pre- ' sent tailzie, nor contract nor ontake debt, nor do no other fact ' nor deed, civil or criminal, whereby the said lands and estate may ' be anyways apprised, adjudged, evicted, or forfeited from them, ' or anyways affected in prejudice and defraud of the subsequent ' heirs of tailzie above-mentioned successive, according to the order ' and substitution above-written. Neither shall it be leisom nor ' lawful to the said James Bruce, or the other heirs of tailzie and ' provision foresaid, to suffer and permit the said lands and estate, ' or any part thereof, to be evicted, adjudged, apprised, or any ' otherwise evicted, for any debts or deeds contracted or done ' by them before their succession, or by any of their predeces- ' sors whom they shall anyways represent, or wherein they shall ' be liable as representing them: All which deeds are not only ' hereby declared void and null ipso facto, by way of exception ' or reply, without declarator, or so far as the same may burden ' and affect the foresaid estate; but also it is hereby provided and ' declared, that the said James Bruce, and the other heirs of tail- ' zie who shall contravene and incur the said clauses irritant, or ' any of them, either by not assuming the name and arms of Bruce ' of Kinross, or by the saids heirs-female, they being unmarried, ' and not marrying a gentleman of the said name, or shall assume, ' bear, and carry the said name and arms; or, being married, they ' and their heirs of the said marriage not bearing and carrying the ' said name and arms as aforesaid, or by their saids heirs their not ' accepting the benefit of this present tailzie within year and day ' after the decease of the immediate preceding heir to whom they ' may succeed in manner respective aforesaid; or who shall break ' or innovate the said tailzie, or contract debts, or commit any ' other fact or deed whereby the said lands and estate may be any- ' ways evicted or affected in manner foresaid; or who shall suffer

July 16. 1830. ‘ and permit the said lands and estate, or any part thereof, to  
 ‘ be evicted, adjudged, or appraised, or anyways affected, for any  
 ‘ debts or deeds contracted or done by them before their suc-  
 ‘ cession, or by any of their predecessors whom they shall repre-  
 ‘ sent, and wherein they shall be made liable as anyways repre-  
 ‘ senting them—That then, and in any of the saids cases, the per-  
 ‘ son or persons so contravening as said is, shall forfeit, amit, and  
 ‘ tynie their right of succession to the aforesaid lands and estate;  
 ‘ and all infetment and pretended right thereof in their persons,  
 ‘ shall from thenceforth become extinct, void and null, ipso facto,  
 ‘ by way of exception or reply, without declarator, as said is; and  
 ‘ the same shall devolve, fall, and belong to the next and imme-  
 ‘ diate heir of tailzie in being for the time, who is ordained to suc-  
 ‘ ceed to the foresaid lands and estate by virtue of the tailzie and  
 ‘ substitution foresaid; to whom it shall be lawful either to be  
 ‘ served heir in special therein to those who died last infet before  
 ‘ the contravener, and thereupon to be retoured and infet; or  
 ‘ otherwise to pursue for declarator, adjudications, or other legal  
 ‘ sentences, which may formally and legally establish the right of  
 ‘ the said lands and estate in their persons, and remanent heirs of  
 ‘ tailzie that are to succeed to them, in manner above provided.’

The deed then gave authority to provide for wives and children, and, after a variety of clauses, contained the following :—‘ With  
 ‘ which reservations, burdens, conditions, provisions, restrictions,  
 ‘ limitations, and qualifications, respectively particularly above  
 ‘ written, the said present tailzie, assignation, and infetment to  
 ‘ follow thereon, is granted and accepted, and no otherwise; and  
 ‘ all which conditions, provisions, restrictions, limitations, clauses  
 ‘ irritant and resolute before written, with the exceptions, reser-  
 ‘ vations, and declarations before specified, are to be inserted in the  
 ‘ instruments of resignation, charters and sasines to follow here-  
 ‘ upon, and in all the subsequent procuratories and instruments of  
 ‘ resignation, charters, special retoured services, instruments of  
 ‘ sasine, and other transmissions and investitures of the said lands  
 ‘ and estate.’

This entail was duly recorded; and the appellant, in virtue of it, on the death of Mr James Bruce Carstairs in 1784, succeeded to the estate. Having become embarrassed, he granted, in 1796, a trust-deed for behoof of his creditors, under which part of it was sold to John Tait of Harvieston, Esq. To ascertain his power to make such a sale, the appellant raised an action of declarator against the other heirs of entail, (including the respondent), to have it found that he ‘ had undoubted right to make the said sale, and

‘to execute the foresaid disposition; and that he was not prevented  
 ‘from so doing by the foresaid deed of entail, or by any of the  
 ‘titles upon which he possesses the foresaid lands; and that the  
 ‘said disposition executed by him, with consent foresaid, is an  
 ‘effectual disposition to all intents and purposes.’ July 16. 1830.

At the same time a suspension was presented by the purchaser, and passed. At first the Court sustained the defences for the heirs of entail; but thereafter, 15th January 1799, pronounced this judgment:—‘In respect the resolute clause in the entail  
 ‘does not apply to a sale of the estate, alter the interlocutor re-  
 ‘claimed against, find the disposition libelled on valid and effec-  
 ‘tual to the purchaser, and find the letters orderly proceeded, and  
 ‘declare accordingly.’ (See *Morr.* 15,539.) On appeal, this interlocutor was affirmed by the House of Lords.

In consequence of these judgments, the estate was sold in 1805 at the price of L. 35,000, and, after paying his debts, there being a reversion, the appellant purchased with it the estate of Balchrystie. He enjoyed the undisturbed possession of it in fee-simple till 1821, when, by the death of a brother, he succeeded (as was alleged) to a considerable fortune. Soon thereafter the respondent (one of the heirs-substitutes) brought an action of declarator before the Court of Session, concluding to have it found, ‘that the said James Bruce,  
 ‘defender, is, by the foresaid deeds of entail, accountable to the  
 ‘substitutes in the foresaid entail in their order, for the price ob-  
 ‘tained for the said lands and estate (Tillycoultry); and that he is  
 ‘bound and obliged, and should be decerned and ordained, by de-  
 ‘cree of Our Lords of Council and Session, to lay out the same in  
 ‘the purchase of other lands, at the sight of such substitute heirs,  
 ‘and to take the rights thereof to the same series of heirs, and under  
 ‘the like provisions, restrictions, and clauses irritant and resolute,  
 ‘or to lend out the same upon landed security, bearing interest,  
 ‘and destined to the same series of heirs, under the like provisions,  
 ‘restrictions, and clauses irritant and resolute; and so often as  
 ‘the same is uplifted, to re-lend the same again in like manner, for  
 ‘the benefit of the defender himself, and of the several substitutes  
 ‘called by the said entail, according to their several rights and  
 ‘interests, all as provided and directed by the foresaid Act of Par-  
 ‘liament; and that until such purchase or investment in landed  
 ‘property is made, the defender is bound, and should be de-  
 ‘cerned and ordained, by decret foresaid, to deposit in the Bank  
 ‘of Scotland the sum of L. 30,000 sterling, or such greater sum  
 ‘as has been received by him as the price of the said lands and  
 ‘others, upon a promissory-note taken payable to himself and

July 16. 1890. ' the substitute heirs of entail in life at the time and of age, nominatim, or the major part of them, and the survivors or survivor of them, in trust, for the purposes of being vested in lands, or being lent out as aforesaid.'

Thereafter, the respondent gave in a minute, stating, That, after the purchase of Balchrystie, he had been informed by the appellant that he was to execute an entail of that estate, and that ' the pursuer, (respondent), and his mother, the late Mrs Bruce of Arnot, were satisfied with this, and supposed this entail had been executed. That, before commencing the present action, the pursuer, although quite aware that the price paid for Balchrystie was only about one-third of the price received by the defender for Tillycoultry, did offer to hold it as sufficient implement of the obligation to reinvest, if the estate of Balchrystie was secured to the same series of heirs as the estate of Kinross had been, by a sufficient and valid entail, containing full power to the defender and his successors to make such provisions for their heirs, and their children, as the original entail allowed. That the pursuer is still willing to adhere to this arrangement, and therefore now offers to withdraw the present action, on condition that a valid and effectual entail of the lands and estate of Balchrystie is executed and completed, so as to secure that estate to the same series of heirs as the estates of Kinross and Tillycoultry were destined. But if this offer is not accepted, then the pursuer will insist, in terms of the libel, that the full price received for the estate of Tillycoultry shall be invested in land or heritable security, in the manner prescribed by the Act of Parliament authorizing the sale of the said estate of Kinross.' This proposal was rejected, and the appellant resisted the conclusions of the action, 1st, upon the same general grounds as those maintained in the preceding case; and, 2d, on the plea of res judicata, which he rested on the judgment previously pronounced, finding that he had power to sell.

The Lord Ordinary reported the case, and thereafter judgment having been pronounced in that of Ascog, (which was held to regulate the decision in reference to the first of the defences), and the other being considered irrelevant, the Court ' found, that the defender is accountable for the price obtained for the estate of Tillycoultry, and remitted to the Lord Ordinary to proceed accordingly.' \*

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\* 5. Shaw and Dunlop, 822.

Mr Carstairs Bruce appealed.

July 16. 1830.

*The Solicitor-General (for the appellant)* having commenced his opening,—

*Lord Chancellor.*—It was understood that this case was to be argued only on any special circumstances, not on the general ground; otherwise the House would not have appointed it to-day, the noble Lord (Eldon) who heard the case yesterday not being able to attend.

*Solicitor-General.*—It is not my intention to urge a single word upon the general question; but I have with me a learned Counsel, Mr Campbell, whose assistance I had not in the other case; and Mr Brougham, who led in that case, has with him my learned friend Dr Lushington, who was not in the other case. I apprehend, therefore, that each of these Counsel may feel it their duty to address to your Lordships such arguments as may suggest themselves to them upon the general question.

*Campbell.*—My Lords, I may not be able to address any thing to your Lordships worthy of consideration, but I certainly shall feel it my duty, for the interests not only of my client but of my country, to address to your Lordships those arguments which present themselves to my mind, to shew that the decision of the Court of Session is erroneous.

*Lord Chancellor.*—I shall take an opportunity of communicating to the noble and learned Lord what passes at the bar. I will take a note of the argument.

*The Solicitor-General* proceeded in his argument, and stated, that it was not his intention to repeat his former arguments.

*Lord Chancellor.*—I should think the most convenient course will be, that you should not enter into the general doctrine in this stage. If, in consequence of any thing which falls from the Counsel on the other side, it should become necessary, you may do it in your reply.

*Brougham.*—There is only this great inconvenience, my Lord, I might say hardship upon me, resulting from that, that my learned friend may reserve his argument for the reply, and after that, of course, I shall have no opportunity of observing upon it.

*Lord Chancellor.*—That which I threw out was upon the assumption, that the Solicitor-General had nothing new to offer, except what may arise out of the observations on the other side; that is the way I meant to put it.

*Brougham.*—There can be no objection to that certainly.

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*Lord Chancellor.*—Any thing new which arises out of your argument, of course it will be his right to urge in reply.

*Solicitor-General.*—I have no new light upon the subject: if my friends present a new view, I shall of course address myself to that.

*The Solicitor-General* proceeded.

*Lord Chancellor.*—The question will present itself thus:—You leave it upon the argument as it stands; Mr Campbell, who has not hitherto argued the question, may present some new arguments, which may render observation on your side necessary.

*Solicitor-General.*—I have every thing to expect from the learning and ability on both sides; both of us have very able assistants on this occasion. I have a right to expect there will be something new elicited. I shall therefore only address your Lordships upon the peculiarities of this case.

(In reference to the case of *Young v. Young*).—

*Lord Chancellor.*—Has any search been made on your side for that case?

*Brougham.*—We never expected any attempt would be made to impugn that case: We shall produce the most satisfactory evidence, by producing the decret itself, not only the pleadings, but the summons, and the whole of the record, in the very words which were used; all is preserved, and can be produced to the satisfaction of your Lordships.

*Lord Chancellor.*—You say that that case was printed from a manuscript in the handwriting of the learned Judge's clerk. The probability is, that the greater part of the collection is in the handwriting of a clerk?

*Solicitor-General.*—That does not appear, my Lord: We have a letter, which has been put into my hands this morning, which states, that it is in the handwriting of a clerk, and not of Lord Monboddo: it does not set out whether the bulk of these notes were or were not in the handwriting of a clerk or of Lord Monboddo. If my learned friend produces a decree, that will of course be entitled to consideration.

*Brougham.*—Being in the handwriting of a clerk is perfectly immaterial; all the Scotch lawyers dictate to their clerks.

*Lord Chancellor.*—We shall see what it is when it is produced; it is not necessary to enter at present into what it may be.

*Campbell (for the appellant)*—In reference to the heir being bound by his service to the conditions of the deed of entail—

*Lord Wynford.*—Does he agree to any thing but legal conditions?

*Campbell.*—I apprehend not, my Lord; and that is the answer July 16. 1830.  
given by one of your Lordships.

(In reference to the case of *Young v. Young*).—

*Lord Chancellor.*—I understood you to say, that you had received information of that case: will you state what is the effect of it?

*Campbell* read the letter which had been received.

*Lord Chancellor.*—The printed papers were not found in the Advocates' Library?

*Campbell.*—No, my Lord, there are no papers to be found in that cause. It appears that his family possess his Lordship's papers in most of the cases he reported, but that they have not these.

*Lord Chancellor.*—With respect to its being in the handwriting of the clerk of Lord Monboddo, I think you should have gone on to tell us whether the other manuscripts are in the handwriting of the clerk or of Lord Monboddo, otherwise you do not distinguish this from others.

*Brougham.*—Your Lordship knows that in that country the learned Judges principally dictate; they write very little.

*Lord Chancellor.*—If a search is made for the proceedings, it is probable they may be found: the Faculty Library is not the place to find them. It is probable the case may be somewhat varied, but one cannot suppose that it is materially mistated, unless that is satisfactorily shewn.

*Campbell.*—It may have been what we call in this country an undefended cause. (He then proceeded in his argument.)

*Lord Chancellor.*—I do not understand what is your view precisely. You state that the interlocutor is bad, not being according to the terms of the summons; that it is necessary to exhaust all the prayer of the summons.

*Campbell.*—As far as it goes.

*Lord Chancellor.*—It is remitted to the Lord Ordinary to go on.

*Campbell.*—I say that the summons is bad.

*Lord Chancellor.*—It was remitted that the Court might go on and act on the residue of the prayer of the summons. You say that the judgment is wrong, but at present they have only declared the right.

*Campbell.*—As far as it goes, it is in the form of the summons.

*Lord Chancellor.*—Is there any objection in point of form?

*Campbell.*—I say the summons is bad, and that the interlocutor is bad. The summons is bad, because it must distinguish be-



July 16. 1830. tween reinvestment and damages in this case; and we do not know in what shape the claim is brought forward, for the prayer 'is that he may be accountable to the substitutes in the aforesaid 'tailzie for the price obtained for the said lands and estate.'

*Lord Chancellor.*—The interlocutors correspond with that exactly.

*Campbell.*—Yes, totidem verbis. But I say that the summons is bad in not distinguishing that; and that the interlocutor is bad in not distinguishing that; and that the interlocutor ought not to have stopped there, but that, when the case was brought to the Inner-House by the Lord Ordinary, they ought to have gone on, and to have delivered the decree as extensive as the summons.

*Lord Chancellor.*—Exhausting the whole prayer of the summons?

*Campbell.*—I say that they ought to have stated in what shape they held Mr Bruce to be liable. It must be a matter of vast importance, whether it was to be laid out in land or in money, or in what way.

*Lord Chancellor.*—I only wished to know how you put it.

*Brougham (for the respondent)* remarked on the argument of Mr Campbell, as having contended that there was no case in which there was not a right to interfere to prevent the mischief.

*Lord Chancellor.*—You can hardly put it so broadly as that:—he did in terms express himself to that effect certainly; but he hardly meant deliberately to contend for a proposition so broad as that.

*Brougham* then remarked on the case of *De Boss v. Beresford*, where the doctrine was laid down by the Chief-Justice, to the surprise of Westminster Hall, that the plaintiff might have gone into the Court of Chancery, and obtained an injunction to restrain the publication; a case reported by Mr Campbell.

*Lord Chancellor.*—Mr Campbell referred to that in his report, I recollect, as matter of great triumph given to the Chancery lawyers over the Common lawyers.

*Lushington (for the respondent)* cited Pothier on Obligations.

*Lord Wynford.*—Lord Mansfield made the same observation, that they were implied contracts, that in this country they were the subject of bills in equity. The difficulty in this case will be, not to prove that there are those equitable rights arising from conscience, but that there is that species of wrong on which the implication of any right can arise.

*Lushington* proceeded, and cited the proposition laid down in the Stormont case with respect to the personal obligation created by the irritant and resolute clauses. July 16. 1830.

*Lord Wynford*.—Is that you have just read the language of one of the Judges?

*Lushington*.—No, my Lord, it is the statement of the party in his plea, which I consider most material, as showing the precise statement on which the question arose, and the way in which they thought fit to put it.

*Lord Wynford*.—If that had been the statement of the Court, it would have been decidedly against you, for it states it to be an obligation arising entirely from the irritant and resolute clauses additionally invented, and containing but a personal obligation.

*Lushington* having remarked on the position laid down in the case of *Gordon v. Cumming*.—

*Lord Chancellor*.—I do not find that in *Gordon and Cumming* that part of the case was argued or considered at all. The question was with respect to the selling.

*Solicitor-General*.—Your Lordship will find, by referring to the opinions of Lord Alloway and Lord Eldin, that it is clear that that point was never argued in that case.

*Lord Chancellor*.—It does not appear to have been argued. I wish you would read that on which you rely as showing that question was raised.

*Lushington*.—‘Although in questions with creditors and purchasers, prohibitions or irritancies in entails do with great justice and reason meet with the strictest interpretation; yet in questions among heirs of entail themselves, the maxim of the common law must take place,—*uti quisque legassit*,’ &c.

*Lord Chancellor*.—That appears to have been considered only as a consequence. The will of that testator, whether expressed or implied, must be supported. Now the Court found, ‘that however safe an onerous purchaser might be, the pursuer, by a voluntary sale of the lands, would contravene the tailzie, and be subjected to an action of reparation and damages at the instance of the substitute heirs of tailzie.’

*Lushington*.—It must have been a matter of deliberation and consideration with the Judges,—because otherwise they could not have given a decree which should have disposed of the whole question at stake,—whether he was at liberty to sell and to dispose of the price at his pleasure? They say, you may sell, but you cannot dispose of the price at your pleasure, because you would be subject to an action for reparation in damages.

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*Lord Chancellor.*—I will refer to the case, and see whether it goes further than I have supposed.

*Lushington* having referred to a note of the case of *Young v. Young*,—

*Lord Wynford.*—We were given to understand that some more accurate and full note of that case would be produced. If you have any such note, we should be glad to see it.

*Lushington.*—It has been sent for, but has not yet arrived. —Having proceeded to remark on the *Westshiells* case, and stated that the appellants in the present case rested their hope on being able to persuade the noble Earl (*Eldon*) that he had in the *Westshiells* case pledged himself that the decision of the Court of Session was decidedly wrong when he moved the House to remit it for further consideration,—

*Lord Chancellor.*—What one can collect is the impression of his opinion, but certainly no expression of a decided opinion can be collected. One sees certainly what was the impression of the noble Lord's mind at the time; but he is not to be considered as bound to any definite opinion.

*Lushington* then proceeded to remark on the authority of the text writers, and stated, that it having been supposed that entails were comparatively of modern date in Scotland, he should produce a deed of entail, with a prohibitory clause, in the year 1489, which he found in *Dalrymple on Feudal Property*, page 162.

*Lord Chancellor.*—Is there a resolute clause too?

*Lushington.*—No, my Lord; I shall shew when they commenced.

Having remarked on the *Stormont* case,—

*Lord Wynford.*—In that case were there clauses irritant and resolute?

*Lushington.*—No, my Lords, there were no irritant clauses.

*Lord Wynford.*—The great point decided was, whether the estate was subject to the debts.

*Lushington.*—Certainly; but the *Stormont* case is important in these respects, that there were no irritant clauses, and there was no inhibition.

*Lord Chancellor.*—The prohibition was guarded only by the resolute clause.

*Lushington.*—Yes it was; that is mentioned in all the papers.

Having read an extract from *Lord Bankton* as to *Heir-looms*,—

*Lord Wynford.*—With respect to *heir-looms*, there is no right or power to sell: a man in that situation, if he does sell, is a

wrong-doer, and his doing so implies a contract to refund all he has got. July 16. 1830.

*Lushington*.—That is precisely this case.

*Lord Wynford*.—The question is, whether this person is a wrong-doer, or whether he has not a perfect right to do that which he has done?

*Lushington*.—The action for reparation here arises ex contractu, out of the obligation on the donee to obey the condition imposed upon him by the donor.—He then proceeded with his argument.

*Lord Wynford*.—Suppose an estate in fee to be given to a man with directions that he shall not levy a fine, he is supposed to take it under that condition; but no lawyer would argue that he might not, notwithstanding that direction, levy a fine, and destroy the remainder. Now, if he did levy a fine, would any action lie against him or his representatives to recover the proceeds?

*Lushington*.—Most undoubtedly not, my Lord; that is English law—but the Scotch law unquestionably proceeds on a totally different principle; and to ascertain what is the Scotch law, we must look to the feudal system and the civil law. The Scotch law, as I have shewn, imposed a personal obligation on the party to perform every condition on which the donation is made to him, unless the performing that condition is contrary to law, which is the only circumstance which can discharge him from performing it. Having remarked on the prohibitory clause,—

*Lord Chancellor*.—The prohibition is distinct and clear as a prohibition.

*Lushington* proceeded, and argued on the effect of inhibition.

*Lord Chancellor*.—If inhibition operates only as notice, your argument is correct.

*Lushington*.—Quacunque via data it is perfectly useless. If the entail be good, the sale is bad; if the entail is bad, the inhibition is waste paper:—He then stated that he was about to address himself to the question of time, it being contended that the parties were precluded.

*Lord Chancellor*.—The objection as to time has not been much pressed. I will not prevent your arguing it if you desire it, but I do not know but that may lead to a reply. You say he may exercise the right of selling, provided he does it fairly for the benefit of accommodating himself: What then becomes of the action of damages?

*Lushington*.—He is subject to an action of damages. We do not claim damages in this case.

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*Lord Chancellor.*—The summons is not for damages?

*Lushington.*—No, my Lord.

*Lord Chancellor.*—How would your argument apply to the former case? How can an action for damages lie, if he has a right to do it for his own accommodation?

*Lushington.*—I should say, there may be cases in which an action for damages would lie, in respect not of the sale of the estate simply, but the abstracting the price. So long as the money is made secure, there is no action for damages, but only when the money is made away with.

*Lord Chancellor.*—When must he lay it out? What time has he then for the purpose?

*Lushington.*—I apprehend that would depend on the equitable discretion of the Court of Session; that they would see that there was a fulfilment of the obligation on the party, and that justice was done to the substitutes in the entail.

*Lord Chancellor.*—You say, that if within a reasonable time the money is laid out in the purchase of other lands settled in the same manner, no action for damages can lie?

*Lushington.*—Just so; there would then be no injury to the substitute in the entail.

*Lord Wynford.*—Who is to decide whether the lands are equal, and whether it has all the same advantages?

*Lushington.*—I apprehend the Court of Session would decide that in the same manner as they would decide now. The price of this estate was so and so; they would direct a proper estate to be purchased with the price.

*Lord Chancellor.*—In the Courts of Scotland is there any person to whom that question could be referred, and who has jurisdiction to decide whether it was a proper investment, as far as related to the circumstances and situation of the substituted estate? or must the party do it at his own risk, subject to having it afterwards reviewed by the Court of Session?

*Lushington.*—I apprehend that the custom is, in the Court of Session, to refer it to certain valuers, and on the report made by them, to decide whether it is a fulfilment of that which is required.

*Lord Chancellor.*—Must that be done before the new purchase is made?

*Lushington.*—I conceive so, my Lord. I understand it is done in sales for the redemption of the land-tax, where the property is to be laid out again; that the Court of Session appoint valuers to see that the money is laid out agreeably to the entail.

*Lord Chancellor.*—There is no mode of securing the money in the meantime, I suppose? How is that to be done? July 16. 1890.

*Lushington.*—The Court order it to be paid into the bank.

*Lord Chancellor.*—There it is secured until it is laid out in an estate approved of by the Court?

*Lushington.*—Yes; and they take a receipt in the name of their own officer.

*Lord Wynford.*—You say the Court do that in sales under an Act of Parliament: Is not there an express direction, not only that it shall be laid out, but that it shall be paid in, and so on? Are not you applying the provisions of this Act to a case in which there is no such provision?

*Lord Chancellor.*—How is it done in the case of teinds?

*Lushington.*—It is done exactly in the same way.

*Lord Chancellor.*—In the case of teinds, is the course pointed out?

*Lushington.*—No, I think not; the Act states that the purchase may be made under certain circumstances.

*The Solicitor-General* commenced his reply, and proceeded to remark on the observations imputed to Lord Eldon in the case of *Westahills*.

*Lord Chancellor.*—I do not think the noble Lord pledged himself to any thing in that case. I am quite satisfied, not only that the noble Lord did not mean to express any definite opinion upon the subject, but that he had not formed any at that time; that it was quite open.

*The Solicitor-General* proceeded, and remarked on the argument of Mr Brougham as to the adopting the condition.

*Lord Chancellor.*—All I understood by that was, that he was an actor, and expressly by his own act adopted the condition.

*Solicitor-General.*—Yes, as every man does adopt a condition who acts upon it. Having remarked on the argument as to a vexatious course of selling,—

*Lord Chancellor.*—Doctor Lushington did not follow that up by stating what would be the consequence of a vexatious course of selling.

*Solicitor-General.*—No: I should like to see a declarator framed to prevent a vexatious sale.

*Lord Chancellor.*—I do not think he stated that you might prevent a vexatious sale.

*Solicitor-General.*—Yes: Lord Balgray hints at the same thing.

*Lord Chancellor.*—How is it to be done?

July 16. 1830. *Solicitor-General*.—A man says, I will sell an estate; he has the power of selling; you cannot prohibit it. Can he be prevented, if he says he is going to do it to vex me?\*

EARL OF ELDON.—In this case of *Bruce v. Bruce*, I am not aware that there is any such distinction between it and that of *Stewart v. Fullarton*, as should lead me to give your Lordships any trouble upon this one. I think the judgment of the Court of Session ought to be reversed.

LORD CHANCELLOR.—Your Lordships having expressed your opinion in the other case in the manner in which you have, it follows as a matter of course that this judgment should be reversed.

The House of Lords accordingly ordered and adjudged, that the interlocutors complained of be reversed.†

MONCREIFF, WEBSTER, and THOMSON—RICHARDSON and CONNELL,—Solicitors.

No. 34. EXECUTORS OF WILLIAM, DUKE OF QUEENSBERRY, Appellants.  
*Brougham—Murray.*

CHARLES, MARQUIS OF QUEENSBERRY, Respondent.  
*Lushington—Sandford.*

*Entail—Reparation*.—Held, (reversing the judgment of the Court of Session), that an action of damages by an heir of entail in possession was not competent against the executors of the preceding heir, who possessed under an unrecorded entail containing prohibitive, irritant, and resolute clauses; and who was alleged to have violated the prohibition as to the letting of the lands; and the penalty of the entail was the heir's forfeiture, and nullity of the act, and not pecuniary damages.

1ST DIVISION.  
‡ July 16. 1830.  
Lords Gillies and  
Meadowbank.

AFTER the judgment of the House of Lords, reported ante, vol. ii. p. 265. (which see), the First Division of the Court of Session, in obedience to the remit, proposed the following Case and Questions to the other Judges.

“ In this case, the House of Lords, of this date, (May 22. 1826), pronounced the following judgment:—‘ Ordered, by the Lords ‘ Spiritual and Temporal in Parliament assembled, that the said ‘ cause be remitted back to the First Division of the Court of ‘ Session in Scotland, to review the interlocutor complained of;

\* The case was then adjourned, and judgment pronounced at the same time as in the preceding case.

† For authorities, see the preceding case.

‡ This case was decided on the 22d, but being connected with the two preceding cases it is reported here.

‘having, in such review, regard, among other considerations, to July 16. 1830.  
 ‘the consideration, how damages are to be estimated which are  
 ‘claimed by an heir succeeding to an estate, on account of a lease  
 ‘or tack subsisting at the time of his succeeding to the estate having  
 ‘been made at an under-value in point of rent, and which lease or  
 ‘rent such heir cannot, according to law, reduce; and with res-  
 ‘pect to which lease or tack it is uncertain, at the time of the com-  
 ‘mencement of his suit, and at the time of pronouncing judgment  
 ‘therein, during what period of the endurance of the tack he may  
 ‘live, or his right to the estate may continue: and also to the con-  
 ‘sideration, whether, if such tack shall endure during a period in  
 ‘which several heirs entitled to succeed shall succeed to the estate,  
 ‘it is competent to each of them so succeeding to institute and  
 ‘maintain, upon their respectively succeeding, a like action or suit  
 ‘for damages on the like account; and how the damages are to be  
 ‘estimated in the respective actions or suits which such heirs res-  
 ‘pectively shall so institute: And it is farther ordered, that the  
 ‘Court to which this remit is made do require the opinion of the  
 ‘Judges of the other Division in the matters and questions of law  
 ‘in this case, in writing; which Judges of the other Division are  
 ‘so to give and communicate the same.’

“*Circumstances of the Case.*—Upon the 9th September 1769,  
 Charles Duke of Queensberry executed an entail of the lands  
 and barony of Tinwald in favour of himself and the heirs-male  
 of his body, whom failing, to ‘our well-beloved cousin William  
 ‘Earl of March, and others.’

“By this entail it is declared, that it shall not be in the power of  
 the heirs to alter the succession; and, under various other restric-  
 tions and limitations as to selling, alienating, &c. ‘and with and  
 ‘under this restriction, that it shall not be lawful to any of the  
 ‘said heirs to set tacks or rentals of the said lands, or any part  
 ‘thereof, for any longer space than nineteen years, and without  
 ‘any diminution of the rental, or for the setter’s lifetime in case  
 ‘of any diminution of the rental; and that it shall not be lawful  
 ‘to any of the said heirs to take grassums for any tack or rental  
 ‘to be set by them, but to set the said lands and estate at such  
 ‘reasonable rents as can be got therefor, so that the succeeding  
 ‘heirs may not be hurt or prejudged by the heir in possession  
 ‘setting the lands at an under-value, or taking, by way of  
 ‘grassum, what falls annually to be paid out of the produce of  
 ‘the lands.’ The irritant and resolute clauses of the entail are  
 expressed in the most complete and efficacious form:—‘Likewise  
 ‘it is hereby provided and declared, that in case any of the heirs



July 16. 1830. ' hereby called to the succession of our said lands and estate shall  
 ' incur any of the irritancies contained in this present tailzie, the  
 ' heir next called to the succession shall be obliged to prosecute  
 ' and follow forth a declarator of irritancy and contravention, and  
 ' to procure him or herself infest and seized in our said lands and  
 ' estate, within the space of two years after the former heir has  
 ' contravened the conditions or restrictions before or after writ-  
 ' ten, or any of them. And in case the said next heir shall ne-  
 ' glect to pursue the declarator of irritancy, and obtain himself  
 ' infest as aforesaid, the said heir so contravening, by neglecting  
 ' to pursue such declarator, shall, for him or herself only, forfeit,  
 ' amit, and lose their right to our said lands and estate, and the  
 ' same shall fall to and devolve upon the heir next called to the  
 ' said succession, who shall prosecute the foresaid declarator of  
 ' irritancy; but all the heirs aforesaid succeeding upon any con-  
 ' travention, and heirs succeeding to them, shall be subject and  
 ' liable to the same conditions, restrictions, and irritancies, through-  
 ' out the whole course of succession for ever.' The deed contains  
 a commission in favour of any one or other of the heirs of entail  
 for recording it in terms of the Act 1685 :—' And we hereby  
 ' grant full power, warrant, and commission to  
 ' as our procurators, or to any one or  
 ' other of the heirs of tailzie before specified, to cause present this  
 ' our disposition of tailzie before the Lords of Council and Session  
 ' judicially, and procure the same recorded in the Register of  
 ' Tailzies, and to expedite charters and infestments thereon agreea-  
 ' bly thereto, in terms of the Act of Parliament anent tailzies; and  
 ' that either in our lifetime or after our decease.'

" Charles Duke of Queensberry, the maker of the entail, died in 1778. William Duke of Queensberry (formerly Earl of March) made up titles in terms of the entail. He never recorded the entail in the Register of Tailzies. Upon his death in 1810 he was succeeded by the present Marquis of Queensberry. The Marquis recorded the entail in 1818. In 1791 William Duke of Queensberry granted a lease of Tinwald Mains to the late Provost Staig of Dumfries, for nineteen years, at a rent of L. 140 sterling. No grassum was taken, and there was no apparent diminution of the rental. In 1796 and 1799 the Duke renewed the lease at these respective periods, for the same period of nineteen years, at the former rent of L. 140. The lease expired in 1818. This lease, as well as the other leases granted of the farms of the estate of Tinwald, were not challenged during the life of the late William Duke of Queensberry: The Marquis soon after his death brought

an action against the executors, as his representatives, upon the ground that the Duke, in the management of the estate of Tinwald, had acted contrary to the injunctions of the entail, by granting leases below the fair and true value; and concluded for damages, or a free yearly annuity. After the usual course of procedure, detailed in the cases for the parties, the Court (Feb. 23. and Nov. 15. 1815), 'assoilied the defenders from all the conclusions of the action.' The Marquis did not carry these judgments to appeal till 1819; and of this date (May 26. 1820) the House of Lords affirmed the above interlocutors, 'without prejudice to any action or actions to be hereafter brought on account of the said leases;' and a remit was made to the Court of Session to review the interlocutors on various points, and to receive additional condescendences. Thereafter the Marquis, in 1820, raised a new action relative to the lease of Tinwald Mains, setting forth generally, that, while the said William Duke of Queensberry was in possession of the estates to which he succeeded under 'the disposition and deed of tailzie aforesaid, he let the whole or most of the farms upon the estates, not at such reasonable rents as could have been obtained therefor, but, on the contrary, he, with an intent to defraud the succeeding heir, let them at rents far below such reasonable rents; and thus the said Marquis, pursuer, has been hurt and prejudged by the said Duke, while in possession, his setting the lands at an under-value;' and concluding for a specific sum of damages, in respect that the lease had by that time expired. This new action came before Lord Gillies, who directed the proper steps to be taken in terms of the Act of Sederunt; and thereafter the case came to be discussed before Lord Meadowbank, who ordered informations to the Court.

"Upon advising these papers, the Court, of this date, (December 15. 1825), pronounced this interlocutor:—'The Lords find the present action competent, repel the additional defences, and remit to the Lord Ordinary to proceed accordingly.' Leave was granted to the defenders to appeal against this interlocutor; and, on discussing the same, the judgment was pronounced on 22d May 1826, already narrated. The judgment having thereafter, upon petition in common form, been applied, (May 31. 1826), mutual Cases were ordered to be given in. That order having been complied with, and the same considered by the First Division of the Court, they, in furtherance of the remit from the House of Lords, put the following questions:—

1. Whether the summons is competent by the law of Scotland?
2. Supposing such action to be competent generally by the law

July 16. 1830. and practice of Scotland, how are damages to be estimated which are claimed by an heir succeeding to an estate, on account of a lease or tack subsisting at the time of his succeeding to the estate having been made at an undervalue in point of rent, and which lease or tack such heir cannot, according to law, reduce; and with respect to which lease or tack it is uncertain, at the time of the commencement of his suit, and at the time of pronouncing judgment therein, during what period of the endurance of the tack he may live, or his right to the estate may continue?

3. If such tack shall endure for a period in which several heirs entitled to succeed shall succeed to the estate,—is it competent to each of them so succeeding to institute and maintain, upon their respectively succeeding, a like action or suit for damages on the like account; and how are the damages to be estimated in the respective actions or suits which such heirs respectively shall so institute?

4. Is an action upon an alleged contravention of the prohibitory or limiting clauses of an entail, when duly fenced with irritant and resolute clauses, necessarily and de jure to be confined to the matters and conclusions directly warranted by these clauses? or may the substitute heirs of entail in any case also demand reparation and damages from the contravener or his heirs, so as to make up any loss which cannot be obtained by the immediate operation of such clauses?

5. Whether, in the circumstances of this case which have been referred to in the pleadings, and where the entail also contains the particular clauses founded on by the defenders, the pursuer is barred by any personal objection from demanding reparation, indemnification, or damages, from the representatives of the late heir?"

The following answers were returned:—

LORDS JUSTICE-CLERK, ALLOWAY, and NEWTON.—In answering the queries put to us, we conceive it better to take them in an order different from that in which they stand; the first or general question, as to the competency of the action, depending chiefly upon the matter which makes the subject of Query 4th. We shall begin, therefore, with considering this latter Query.

Query 4.—We are of opinion, That where the prohibitions and injunctions contained in an entail are fenced with proper irritant and resolute clauses, it is incompetent for the substitutes, in case of alleged contravention, to maintain an action of damages; and that they must confine themselves to the remedies which the entail gives them by means of these clauses. This opinion, we conceive, stands quite clear

of the decision of the Court in the case of Ascog. Where an entail has prohibited certain acts, but has failed to secure his prohibitions in terms of the statute 1685, he must be held to have looked to the common law as the means of enforcing them ; and this law, if it operate at all, can only do so by admitting an action of damages to repair the loss arising from the contravention. But the case is materially different where the entailer has availed himself of the statute, by fencing his prohibitions with irritant and resolute clauses. He thereby adopts the sanctions of the Act, and points out precisely the remedies which are to be competent ; and as these are the best, and indeed the only effectual ones, to allow the substitutes to neglect them, and resort to others of a quite different and less effective nature, would be to disregard his declared will, and, in many cases, to defeat his main object. In the present entail, which is strictly in terms of the statute, the maker has not only provided and declared that the consequences of a contravention shall be a forfeiture of the contravener, and the nullity of the deed inferring in it, while he specifies no other remedies whatever ; but he has shewn his will that these particular sanctions shall be enforced, by making it imperative on the next substitute, under the pain of forfeiting his own right, to follow forth a declarator of irritancy within the space of two years from the date of the contravention. It seems impossible in such a case to suppose, that the entailer could have meant to allow the substitutes to leave the acts of contravention unreduced, and to claim damages for the loss arising from them. But the law on this point we understand to have been fixed by the judgment of this Court, and of the House of Lords, in the action of damages at the instance of the Duke of Buccleuch against the present defenders. Had the Tinwald entail, then, been recorded, we think it clear that no action such as the present could have been maintained ; and it does not appear to us, that the circumstance of its not being so when the lease complained of was granted, can have the effect to make it competent. It is true that in the case of *Dorrator* an unrecorded entail was found effectual against the heir in possession. But this goes no farther than to hold, that, quoad heirs, recording is not necessary to give it effect, or, in other words, that it shall have the same efficacy against them as it would have had when recorded. But it does by no means follow, that the want of recording is to change the nature of the deed, so as to create, by implication, new remedies not given there. If there could have been no room for an action of damages under the recorded entail, we do not see how the very same deed can have different and more extensive effects, merely because it remains incomplete. It has been argued, indeed, that a claim of damages may arise from the very failure to record ; that it was the duty of the late Duke of Queensberry to have completed the deed by recording ; and that, as the noble pursuer has been deprived by this neglect of the means of reducing the lease, the defenders, as the Duke's representatives, are bound to make up the loss. But to give ground

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July 16, 1830. for this argument it must be shown, that the Duke lay under such an obligation. Now, we can see nothing in the entail imposing it as a duty on the heir in possession to record the deed. There is an injunction on him, under the pain of an irritancy, to make up his titles to the estate in terms of the tailzie, and that he shall possess on no other title. But with these injunctions the late Duke strictly complied. There is also a procuratory, giving power to the heirs of entail generally to put the deed on record; but there is nowhere an injunction on any person to get this done. In such circumstances, we think the negligence lay entirely with the substitutes themselves. They had the sole interest; and it is to their vigilance in protecting their interest that the entail seems to have wholly trusted.

*Query 5.*—After answering the 4th Query in the manner we have done, it seems very immaterial to consider whether the pursuer is or is not barred personali exceptione. The ground on which he is stated to be so is, 1st, That having failed to bring a declarator of irritancy against the late Duke within two years after the lease complained of was let, he has himself incurred an irritancy under the entail, and is not entitled to found upon it as authorizing the present action: That had a declarator of irritancy been brought in the Duke's lifetime, but after the two years had expired, he might have effectually objected, that the pursuer, having contravened the entail, was not entitled to declare a forfeiture under it, and that the defenders must have right to urge the same objection. Admitting that the Duke could have competently defended himself by pleading that the pursuer had also contravened, it strikes us, that it might have been necessary previously to shew that the pursuer knew of the contravention from the time of its taking place; a thing which has not been alleged, and which is not naturally to be presumed, considering that leases are private instruments, necessarily known only to the contracting parties. It seems very questionable if the pursuer could have forfeited his right by failing to complain of a contravention, of the existence of which he was utterly ignorant. A second ground on which the pursuer may be held barred from founding any claim of damages on the neglect to record the entail is, that he has taken benefit from this very neglect, in so far as he has been thereby enabled to relieve himself of personal debts to the extent of above L. 100,000, which, having become capable of affecting the entailed estate, are to be paid off by a sale of part of it. To this, however, it may be answered, that as the question of personal objection becomes of consequence only on the supposition that an action of damages is otherwise competent, and as on this supposition the substitute heirs may claim damages from the Marquis to the extent of the value of the lands carried off, he is not relieved in effect of any part of his debt. It will only be transferred from one set of creditors to another. But the effect of this answer evidently depends on the substitutes making such a claim. If they do not, or cannot in the circumstances establish it, then it appears to us that the Marquis will derive

a very great personal advantage from the very circumstance that his predecessor did not record the entail; and that he is not entitled to found any claim of damages on the ground of such failure. The existence of personal bars is, however, of no consequence, if we are right in our views of the incompetency of the action. July 16. 1830.

*Query 1.*—We have answered this Query in what we have said on the subject of the fourth.

*Query 2. & 3.*—The subject of these Queries seems also immaterial; for if an action of damages cannot be maintained, it is unnecessary to inquire how these damages are to be estimated or divided among the different heirs who may happen to possess the estate during the currency of the objectionable lease. As the attention of the Court seems, however, to be called particularly to this subject in the remit by the House of Lords, it may be proper to state what occurs to us, supposing the action had been competent. It does not appear that, in the circumstances of the present claim, the least difficulty can be felt; because, as the lease complained of had expired before the summons was executed, there can be no doubt either as to the mode of estimating the damage, nor as to whom it is due. Neither do we think the difficulty considerable, where the heir in possession has not gone farther than to infringe the injunction to let at reasonable rents, having kept his leases within the period permitted by the entail. As the sole complaint, then, arises from the inadequacy of the stipulated rent, the damage will just be the difference betwixt this and what would have been a reasonable rent at the time of letting. Any variation in the value of land during the currency of the lease ought to have no effect; because the obligation being to take a reasonable rent when the contract was made, this is the time when the heir must exercise his judgment. A subsequent rise of value ought not to increase the damages, nor ought a fall of rents to diminish them; for, had a fair rent been stipulated at the commencement, the succeeding heir would at least have had the tenant's obligation to pay this during the lease, and his chance that the obligation would be fulfilled. As the annual damage, therefore, admits of immediate estimation, there seems no great difficulty in apportioning it among the successive heirs. The damage may be decerned for in its natural form of an annual payment during the subsistence of the lease, to be drawn by the person who shall have right to the rents for the time; or, if it be necessary to settle by a payment at once, by applying this in the purchase of an annuity for the period of the lease; or, where there is a deficiency of funds, by applying whatever can be recovered in procuring such annuity as it will bring. The heir in possession, no doubt, settles in this way for the succeeding heirs, as well as for his own interest; but this is no more than he is authorized to do in any litigation he may maintain regarding the estate. The difficulty may become much more formidable, if we suppose the heir to have contravened at the same time the prohibition as to endurance, by letting a lease for a period far beyond that permitted

July 16. 1830. by the entail; yet such a lease, from the deed being unrecorded, might have been effectual. The reasonable rent at the time of letting can be no criterion of the damage beyond the first nineteen years; for as any lease in terms of the entail would have come to an end by that time, the heir then in possession would have had it in his power to resume the lands, and to benefit by any intermediate rise in their value. Besides, it is quite impossible to say, supposing the future heirs disposed to have conformed to the provisions of the entail, what number of leases might have been let during the hypothetical time assumed, nor at what particular periods these might have come to an end. Such difficulties we cannot pretend to obviate; but as we do not hold the action to be competent, we are noways called upon to do so. This can only be required of those who maintain the opposite opinion.

LORD GLENLEE.—*Query 1.* For the reasons stated in my answer to the 4th Query, I rather incline to think, that action for the pursuer's claim does not lie against the general representatives of the late Duke of Queensberry; and that, therefore, the process falls to be dismissed. But I hesitate as to saying, that, in strict technical language, the summons is incompetent by the law of Scotland.

*Query 2. & 3.*—I agree with the opinion of my Lord Justice-Clerk.

*Query 4.*—In the case put in this Query, I think that the substitute heir is not, in all circumstances and universally, de jure confined to the remedies which are articulately and in express words provided by the tailzie. Thus, supposing the tailzie to be perfect, as stated in the introduction to the queries, but not recorded in the Register of Tailzies, and that the heir on whom the estate has devolved sells it, and that the purchaser's right is safe;—in such a case it is obvious, that a substitute heir could not be benefited in any possible way by merely irritating the contravener's right; and I do not see any thing which precludes him from insisting in an action for having the price reinvested in lands to be settled under the same destination, and under the same fetters as those provided by the original tailzie, and for having the money in the meantime, till an opportunity for reinvesting occurs, properly secured; and I think the action would also lie against the contravener's heirs. In the present case, however, taking it as stated in the introduction to the questions, the matter may perhaps stand otherwise; for the contravener, although by neglecting to do what the entail enjoined he may have occasioned loss to the pursuer, took no benefit to himself, and did not become lucratus by the transaction complained of. Thus, the claim made by the pursuer is highly penal, a parte rei; and no step having been taken during the contravener's life, it may be thought that the claim does not transmit against his general representatives; and this, on the same principle on which the universal passive title of vicious intromission cannot be made the ground of an action against the representatives of the intromitter, except to the extent of his actual intromissions, unless it has been raised and insisted in during his life. There are many

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other cases in which the same doctrine has been applied; but I am aware there are also cases in which, at first sight at least, it might be thought that the action was of a penal nature, and yet it has been sustained against heirs, when pursued only to the extent of reparation. And although I am inclined to think, that, on examination, it would be found that those decisions may be justified without impeaching the applicability of the doctrine to other cases, yet the discussion would be long, and I must just content myself with saying, that, on the whole, I incline to think that the doctrine is applicable to such a case as the present, taken with all its circumstances.

*Query 5.*—I am not satisfied that the action is barred by the personal objections stated against the pursuer. They are quite of a different kind from that which occurred in the case of Barholm, where it was no doubt found that an heir of entail, who, it appeared from the libel, possessed the remainder of the estate by feudal titles made up under a new entail inconsistent with the original one, and which new entail bound him to possess by no other title, could not, in the character of heir under the original entail, pursue for reduction of other deeds alleged to have been granted in contravention of that original entail. This was plainly an objection to the title to pursue, arising from the personal conduct of the pursuer, which was available to the defenders without the necessity of any separate procedure for establishing that the pursuer himself had incurred an irritancy: but in the present case I see nothing of this sort; and it appears to me, that the pursuer's character as heir of entail, on which he founds, must be held to subsist, unless it should be set aside, if it can be set aside, by those who have right to insist in an action for that purpose.

*LORD CRINGLETIE.*—*Query 1.* Whether the summons is competent by the law of Scotland?—I understand that this question has no relation to the form of the summons, but applies to the point, Whether such an action as the present can be maintained against the defenders? Viewing it in that light, my answer demands explanation. The tailzie on which the action is laid, prohibits the letting of leases for longer than nineteen years; 2d, The diminution of the rental, except by a lease for the lifetime of the granter; and, 3d, The taking of grassums, declaring that the lands must be set 'at such reasonable rents as can be got therefor, so that the succeeding heirs may not be hurt or prejudiced by the heir in possession setting the lands at an undervalue.' The lease to Provost Staig in 1791 was for L.140 yearly during nineteen years, which is not alleged to have been in diminution of former rent, neither is it said that grassum was taken: The lease was renewed in 1796, and afterwards in 1799, for the same rent and same period of endurance. There can therefore be no ground of complaint under the provisions of the tailzie, unless that the lease was not granted for a reasonable rent. The entail contains irritant and resolute clauses, applicable to its various prohibitions, and, among others, to that of leases let under a reasonable rent; but the



July 16. 1830. entail not having been recorded, whereby the lease in question could not be set aside, the noble pursuer rests his claim on the assumption that a contravention has been committed ; and, assuming that the late Duke having violated the prohibition not to let a lease under the reasonable rent that could be obtained at the time, pleads, that his Grace had violated his own obligation not to let such a lease. In other words, he assumes that a prohibition in an entail to do any act, constitutes an obligation not to do it ; and this seems to be the principal ground of the claim, supported by reference to various authorities, all quoted and referred to in the case of Ascog, then depending before your Lordships. As that question has been decided by your Lordships in favour of the prohibition being construed to be an obligation, I should consider myself bound to adopt that judgment as law ; but as it has been appealed from, whereby the House of Lords will have to take the point under their consideration, and the present case will probably have to return to that high tribunal, I hope that I shall not be considered as presuming too far, when I refer to the opinion which I gave to your Lordships on that case of Ascog, and of which you must be in the possession of a printed copy. I will only repeat, that, with due deference to that case, I cannot convert a prohibition or a restriction into an obligation. I know no case where any man has come under an obligation in which it cannot be enforced, or the performance of it secured, by the diligence of the law ; and it is on this principle, that a prohibition could be enforced, and observance of it secured by diligence, that M'Kenzie, Lord Stair, Bankton, Elchies, Erskine, and every authority quoted by the pursuer, laid down, that such prohibition constitutes an obligation upon the heir of tailzie in possession not to disregard it, and renders the violator subject to indemnify the succeeding heirs ; but it is a decided point, since the days of these authorities, and now uncontroverted, that no diligence is competent to enforce the observance of a prohibition, and thereby proves that it does not constitute any obligation. It is merely a prohibition, and nothing else ; and if it be not made effectual by the sanction afforded by the law, it is good for nothing, except to secure against gratuitous deeds in disregard of it, which it does effectually.

The law has given to every man the power of rendering his prohibitions effectual by means of irritant and resolute clauses ; and if he do not choose, or if he neglect to use them, the presumption of law is, in my opinion, that he means only to tie up his heirs from giving away his land gratuitously, but leaves them at liberty to dispose of it for onerous causes, as I have fully explained in my opinion in the Ascog case, to which I refer. When the law has given one effectual mean of rendering a prohibition effectual, I do not think that additional ones should be given by constructive interpretations of words.

But in this particular action I am clearly of opinion, that the matter has been settled, both here and in the last resort, by the judgments in the cases between the present defenders and the Earl of Wemyss

and the Duke of Buccleuch. In these cases, the late Duke of Queensberry had let leases, which were all declared to be contraventions of the entail under which his Grace possessed, for they were all reduced and set aside as such. There the matter went on in a regular shape by the contravention being ascertained, after which came the actions of damages at the instance of the Earl and Duke against the present defenders; and these actions were all founded on the contravention of the prohibitory clause in the entail. The action for reducing the leases lasted for nine or ten years before it was decided; during all which the tenants possessed on payment of the rents stipulated in their respective leases; and ultimately it was decided, that bona fide possession protected them from paying more than these rents during the long period while the actions were in dependence. In this way the Earl and the Duke sustained a serious loss, which they called on the present defenders to indemnify; but it was determined that no such action was competent, notwithstanding the said obligation, under which it was alleged that the late Duke of Queensberry had come by possessing under the entail. No doubt there were irritant and resolute clauses in it, and it was recorded, which would have enabled the Earl and the Duke of Buccleuch to have set aside these leases during the Duke of Queensberry's life, and forfeited his title to the estate; but although that was one remedy competent, it could not have taken away the other, arising out of the obligation implied from the prohibition to let such leases, if that had been understood to exist. But the contrary was decided—it was found, that the present defenders were not liable for damages; and therefore I hold this as a precedent, that a prohibitory clause does not constitute any obligation, and, at all events, that no claim of damages is competent, where there are irritant and resolute clauses in a recorded entail to enforce the prohibition. It is true, that in these cases the leases were set aside; whereas in the present one, although the tailzie also contains irritant and resolute clauses, the leases to Provost Staig could not be reduced, owing to the entail being unrecorded. But here, I ask, whose fault was it that the entail was not recorded? It expressly conferred power on all the heirs under it to apply to have it put on record; and I cannot conceive that the Marquis of Queensberry, by omitting a duty incumbent on his Lordship, can plead that he is thereby entitled to what otherwise he could have had no claim. Besides, I think that it is well observed by the defenders, that if the entail had been recorded, and the pursuer had attempted a reduction of the leases to Provost Staig, his Lordship would have had a still more difficult task to execute than the Duke of Buccleuch had; and during the time the affair would have been in litigation, the lease would have expired, and his Lordship would have got no damages, more than did the Duke of Buccleuch. And here again it would be not a little singular, if, by omitting to get the entail recorded, his Lordship shall be in a more favourable situation than if it had been complete and effectual.

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Another consideration to show the incompetency of such an action as this, is the difficulty which, in some cases, may exist in disposing of it. In the present case there would be no difficulty, because the lease is expired, and there is but the pursuer, as heir of tailzie, who is entitled to damages if they be due. But, in order to render such an action competent, the principles on which it proceeds must apply to all cases of the sort. The late Duke of Queensberry might have let a lease for ninety-nine years, in which case there would have been many heirs, and a long course of time embraced under one lease. One heir has no right to pursue for damages to his successor; and consequently, if there happen to be twenty heirs during the lease there may be twenty actions. One heir may be entitled to damages, and his successor not; because, by the change of times, the rent reserved in the lease challenged may be reasonable. Then times may vary, so that large rents may return. Even in the course of one man's life the amount of damages may vary. In order, therefore, to afford a fair rule for estimating damage, the action would require to be current, and the amount be settled every year. For damage is the amount of a man's loss, and consequently must vary with the times. The Court is not entitled to settle it on a course of time, as if a lease were granted, for that would be making a lease which never existed. Then comes the question, How are funds to be set apart and secured to pay an unsettled and contingent loss? nay, a loss which may be dormant during one heir's time, and rise up again in the life of his successor? It is certainly so difficult to direct a Jury how to ascertain this, as to amount to an impossibility, which goes to shew the incompetency of such actions.

*Query 2. & 3.*—I think it necessary to add together these two Queries, in order to answer them with correctness. They are in part answered by my observations on the preceding query. But in farther explanation I beg leave to remark, that if an action be competent to one heir, to insist in an action for damages or reparation on account of a lease having been let at a rent lower than could be considered reasonable, the same right must be competent to each succeeding heir. The heir in possession is entitled to give, during his own life, the farm at any rent, however low; and, in this predicament, I do not think that it would be sufficient for each heir to state that the rent was too low at the time the lease was let, because his claim is for damages only; and if he could not shew that the rent was too low at the time that he complained, he could suffer no damage whatever. Supposing it competent for him to set aside the lease altogether, he could get no more than the rent which the farm could afford at the time, whereby, comparing that with the rent reserved, the difference must be the measure of the damage: and to me it seems to follow of course, that an action of the nature referred to must be current, and require a new proof every year during the possession of the heir, if the lease should last so long. Take, for instance, this very case.—The noble

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Marquis succeeded to the late Duke of Queensberry in 1810, the period of the highest rents given in Scotland. Had his Lordship brought this action, and his damage been ascertained by the rates of that year, to continue downwards to the year 1818, in which the lease expired, gross injustice would have been done, because, in a few years after, rents fell from 25 to 30 per cent; and, consequently, to do justice, (supposing the action to be competent), the Court must have taken evidence of a reasonable rent for every year by itself. If it be said, that the damage must be estimated on the principle that the Duke of Queensberry, or any heir of tailzie in his circumstances, ought to have let the farm at a reasonable rent at the time; and the rent which would have been reasonable at the time, ought to be held to be the rule for ascertaining the damage during the lease;—it appears to me that this cannot be the rule; because I do not think that any heir is bound to give leases at all—he may let from year to year if he pleases. *2d*, The right competent to the succeeding heir is to get rid of the lease, if one had been let, and to let a new one; so that the only rent to which he is entitled is that which is reasonable when he succeeds, and gets quit of the subsisting lease. Even supposing that the noble Marquis has a right (which I think he has not) to insist that the late Duke of Queensberry was bound to let a lease for nineteen years at the rent that could be reasonably got at the time, it is quite clear that there could be no slump sum of damages awarded, because such sum would proceed on the principle of buying an annuity, to last as long as the lease, of a sum equal to the difference between that reasonable rent, and the rent actually reserved by the lease; and it is clear that no such sum could be awarded to the Marquis, because there could be no certainty that he would live during the whole period of the lease; and he has no sort of right to pursue any right competent to his successor.

*Query 4*.—I consider this to be answered by the observations made in considering *Query 1st*, viz. ‘That the substitute heirs cannot demand reparation and damages from the contravener or his heirs, so as to make up any loss which cannot be obtained by the operation of the irritant and resolute clauses.’ But I beg leave to add, that, in this particular case, my observations on the general law are decidedly enforced by the clause of the entail quoted in the preface to the questions put by the Court, to be adverted to in answering the next question.

*Query 5*.—I am clearly of opinion, that the noble pursuer is barred *personali exceptione* from insisting in this action. His Lordship has personally incurred an irritancy, and forfeited right to the estate, under the express words of the clause just referred to, and fully quoted in the preface to the questions.

This clause, more decidedly than any thing occurring in the other Queensberry causes, proves that no action for damages for contravention can exist. It points out the remedy:—It orders the next heir to

July 16. 1830. set aside the contravention, and forfeit the contravener, within two years after. Had the present pursuer observed this, there could have been no room for this action. The lease to Provost Staig (if it be a contravention, which has not yet been regularly declared) would have been the ground of forfeiting the late Duke of the whole estate, or forced him to purge the irritancy by sweeping away the lease; in either of which cases there would have been no ground for this action. The Marquis has personally incurred an irritancy, and forfeited right to the estate, under the express words of the clause just referred to; and although the defenders have no right to declare that contravention to the effect of forfeiting the noble pursuer of his estate, it appears to me that they are obviously entitled, when his Lordship is founding on an alleged act of contravention of the same entail done by the late heir of the estate, in whose right they stand, to tell him that he has himself contravened it, and, having forfeited, has no right to pursue this action. Put the case, that the Duke of Queensberry were alive, and that the Marquis had been pursuing a declarator of irritancy against his Grace during the subsistence of the lease to Provost Staig, but more than two years after its date; it seems to me quite clear, that the late Duke would have told the Marquis, that, by omitting to challenge that lease within two years, he himself had contravened and incurred a forfeiture of his title to the estate, and was not entitled to pursue. For the same reason, the same answer must be competent to the Duke's executors, when they are called on by the Marquis to pay damages for that contravention. To me it seems unreasonable, that an heir shall disregard one clause of an entail, and complain of his predecessor for disregarding another clause of the same deed. It may be urged, that the heirs of tailzie could not know that a lease had been granted, and therefore could not pursue the contravention. But I am not moved by that; they must stand or fall with the entail. By that deed certain deeds are prohibited under an irritancy, among which the granting of leases in contravention of the entail is one; and the heirs are required to pursue every contravention within two years. The tailzie assumes their vigilance and acquaintance with every contravention; and if they don't discover it, theirs is the misfortune or the fault. The tailzie does not require them to pursue a contravention within two years after it shall come to their knowledge: it presumes their knowledge, and provides that the contravention shall be declared within two years.

In the case of Gordon of Carleton, the tailzie prohibited contraction of debt, and declared, that the contravener should forfeit for himself and the heirs of his body. Alexander Gordon, one of the heirs of tailzie, contracted debts, which were challenged by his son Alexander. But this Court (21st June 1749) found, 'That, by the conception of the entail, the person contravening forfeits for himself and his heirs; and therefore it is not competent to Alexander Gordon, the son of the alleged contravener, to object to the debt upon the

‘estate of Carleton.’ Hailes, vol. i. p. 48.; Kilkerran, *vs* Tailzie, July 16. 1830. p. 545.

The late Mr Little Gilmour insisted in an action for setting aside a lease which had been granted by his deceased father in contravention of the tailzie under which he had possessed;—and it was pleaded by the defender, that the tailzie forfeited the contravener, and the heirs of his body; so that, if the lease under challenge was a contravention, the pursuer cut the branch on which he stood: he, *eo ipso facto*, proved the contravention to extend its effects to himself, whereby he had no right to pursue; and the Court being of that opinion, dismissed the action. The self-same principle appears to me to rule this action. Under the tailzie libelled on, the Marquis had his remedy: he omitted to use it, and has, by operation of the same tailzie, incurred a contravention, and forfeited his own right to pursue.

The same principle that ruled the cases just quoted, guided the Lords of the Second Division, in the question between Mr M'Culloch of Barholm and various persons who had purchased parts of that estate, (17th May 1826). It was held, that Mr M'Culloch, having contravened the entail on which he founded, was not entitled to complain of contraventions by a preceding heir.

LORDS MACKENZIE and MEDWYN.—We shall give precise and articulate answers to the questions put by the First Division of the Court before we conclude; but we feel it necessary to begin by expressing, in our own way, our opinion upon certain points.

1. In the *first* place, then, we are of opinion generally, that, in cases of strict entail in Scotland, damages may be awarded to the heir of entail, as representing the entailed estate or series of heirs of entail, for injuries done to that estate; and that these damages must be disposed of so as to repair as nearly as may be the injury to the entailed estate, or series of heirs. We shall suppose the case, that an estate is bought for a full price and entailed, and that, after the death of the entailer, the whole estate is evicted, from defect of right in the seller,—we ask, in such case, is there to be no claim of warrandice, or for damages, which is the same thing, on account of this loss? We can have no doubt that there must be a claim of damages against the seller. By whom then? We think clearly by the heir in possession, as representing the whole series of heirs of entail; or, in other words, for himself and his heirs of entail. His own right is clear. But farther, he is, by the form of the right, the proprietor; the others are his heirs, though no doubt under entail, but still his heirs. Why, then, should not he have right to sue the seller for damages on account of this eviction? We see no reason. We do not see how any remedy can be obtained otherwise: Nor do we see why any difficulty should be made in allowing this, more than in allowing the heir of entail in possession to maintain all the real rights of the entailed estate. He, it is clear, may pursue to vindicate the real right to the land under the entail, if an attempt is made without right to usurp it, or any part

July 16. 1830. of it, or any right upon it. Why should he not equally sue for an equivalent in case it be evicted? The same thing must, we think, be said, in case any part of the entailed estate be evicted; or in case the extent of it be found less than was warranted by the seller to the entailer; or if any part of the estate be lost by defect in the conveyances, arising from culpable ignorance or neglect in the conveyancer employed. Again, the same thing must, we think, be said, in case a real debt of the seller's should emerge against the entailed estate,—or if a servitude should emerge contrary to his warrandice,—or a feu-duty. It is equally clear, we think, that there must be a legal claim of damages in the heir of entail in possession, in case the whole or part of the entailed estate should be destroyed by the injury of another person;—as, if the land should be washed away by the sea, or a river, or overflowed in consequence of injuriously breaking down, or failing to make, or keep up, a bulwark. In all these cases we think there can scarcely be room for doubt, that there must be a claim and action of damages, and that this must be competent to the heir in possession, as for himself and his heirs of entail. How, then, must the money received as damages be bestowed in these cases? Shall it go to the heir in possession in fee-simple? No. That would manifestly be unjust. It must be equitably employed for the interests of all concerned; *i. e.* land must be bought with it, and entailed; or it must, in some way, be settled so as to indemnify, as nearly as may be, all who suffer by the injury. In short, there must be an equitable disposal of it, at sight of the Court; just as there is of the surplus, when an entailed estate is judicially sold for entailer's debt, or debts of an heir, by which it happens to be affected—as was done, for instance, in the case of Smollet, where part of an entailed estate was judicially sold for debts of an heir of entail contracted while the entail was not recorded.

2. It appears to us, that the temporary nature of any loss caused by injury to an entailed estate can make no difference, except in the equitable mode of disposal of the damages recovered. Put the case, for instance, that on an entailed estate a mansion-house is set fire to, and destroyed injuriously,—or that a wood or fences are destroyed,—or that the agricultural state of the land is deteriorated, so as to require a certain time to restore it: Or suppose that a liferent, or temporary right of usufruct, or feu, affecting the whole, or part of an entailed estate, is evicted, from fault in the party who sold it to the entailer; or that a lease for 500 years, at a nominal rent, is evicted out of it in the same way, or for 100, or 50, or 20 years; or that an annuity is evicted out of it for 100, or 50, or 10 years; or a servitude of any kind for a limited time—it seems equally clear, that damages must be due, and that the heir in possession must have right of action for them. The only difference must be, that the damages, when recovered, would be employed in a different way, *i. e.* as closely as might be to compensate the parties who suffered, or were to suffer,

the temporary loss; as, for instance, in rebuilding a similar mansion-house, in restoring fences and a good state of the ground; or, if reparation in that way was impossible, by way of equipollent, as in settling on the heirs of entail existing during the time, a provision equal to the loss by the rent or annuity taken out of the estate. July 16. 1830.

3. We cannot see why it should make any difference, that the injurer of the entailed estate is himself one of the heirs of entail. Suppose, for instance, that an heir in possession maliciously breaks down a dyke, and lets the sea sweep away an entailed estate; or burns, or takes down and sells the materials of the mansion-house;—can there be any doubt that, after his death, the next heir of entail can sue his representatives for the damages? And the case seems just equally clear, when the wrong done by an heir consists in defeating the entail injuriously; as in omitting the irritant and resolute clauses in making up titles, and so alienating the estate to an onerous third party,—or any real right out of the estate,—or conveying it with debt to such party; or in making such alienation or contraction of debt while the entail is still unrecorded,—or in making an onerous change of the succession in such circumstances. In all these cases there seems to be no room for doubt, that the parties suffering must have relief by action of damages; and that, whatever difficulties there may be in other respects, at least the heir holding, or entitled to hold, the entailed estate, may sue, as representing himself and the other heirs, *i. e.* his heirs of entail. Again, the same thing must hold in case the injury from the wrongous act of an heir of entail be of a temporary nature, as the constitution of a liferent or temporary feu, or servitude, or annuity, while the entailing clauses stand omitted in the making up the titles, or the entail stands unrecorded. In these cases it seems equally clear, that the heir in possession, or holding right to possession, of the entailed estate, must have right to sue for damages, as representing the series of heirs; and that the damages must be liable to an equitable disposal, to provide for the fair interest of all concerned as closely as may be. Put the case, then, that an estate worth L. 10,000 a-year is let on a lease for 1000 years, at a rent of L. 100, by an heir of entail who has omitted to insert the fetters in making up his titles, or while the entail is unrecorded, and that at his death he leaves this lease operative against the entailed estate,—we can see no reason why a claim and action for damages should be less competent, or otherwise operative in this case, than if a similar lease had been found in force against the estate by the fraud of a person who sold it to the entailer, and contrived to get the lease concealed from him; nor indeed any reason why the effect of such a lease should be different in this respect from that of a perpetual feu for the same rent. Diminish, then, the endurance, and increase the rent; let it be a lease for 100, or 50, or 19 years; let it be for a rent of L. 500 or L. 1000, the rent still being grossly inadequate, the principles of law applicable to the case remain the same. Let it then be a lease only of one farm, for a moderate time, but still the



July 16. 1890. rent grossly inadequate, so that the lease is a manifest contravention of the entail, and valid only by the want of insertion of the fetters, or of recording, still the principles of law applicable to the case appear to remain unchanged. That, however, is just the present case, as it is alleged on the part of the Marquis of Queensberry. For what he alleges seems just this,—That the late Duke of Queensberry, being heir in possession of an estate strictly entailed, but the entail not being recorded, let a lease which, counting from the expiry of a former lease, was of the endurance of 8½ years, and that of a farm worth L. 550, at a rent of only L. 140; and for that, he, the heir of entail, having succeeded to the entailed estate before the commencement of this unfair lease, demands damages. He states further, that there need be no question here as to the employment of the money to be recovered as damages, because he, the pursuer, has already possessed the estate during the whole time of this injurious lease, and so he himself has suffered the whole injury. This last statement relieves the Court of the trouble of disposing of the damages, to secure the interest of all concerned; but surely it cannot have the effect of making the pursuer's right to these damages worse. On the contrary, if there were any difficulty in cases of this kind, arising from the heir in possession being as representative of the whole series of heirs, and for the interests of them all, that circumstance seems to rid the case of that difficulty. But we really do not see any such difficulty, nor any difficulty at all, in cases of the kind, except those which Courts of law, when equity is included in law, as it is in this country, do and must overcome. After these remarks, we proceed to answer the questions put by the First Division of the Court.

1. We think the summons competent.

2. and 3. We think that, in the case referred to, the heir of entail would, as representing the whole series of heirs of entail, or in other words, for himself and his heirs of entail, be entitled at once to claim damages for the whole injury done, or to be done, to the entailed estate by the lease, without any regard at all to the probable duration of his own life, or of his right to the entailed estate: That, in such a case, it would in like manner be competent for any after heir of entail to demand damages for himself and the after heirs, though we think not for any heir who predeceased him, unless he claimed as the representative of that heir: That we do not conceive it would be competent for any heir of entail to demand a priori damages as for himself alone, while the endurance of his life, or right to the estate, was uncertain: And that if, in such a case, no action was brought during the currency of the lease, we can see no principle whatever on which the separate representatives (if they had separate representatives) of every one heir who had suffered from the lease could be denied action of damages for the loss accruing to him.

4. In case an entail be not recorded, we think that an heir of entail, upon contravention, may demand damages from the contravener

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or his heirs, although it has been found that, after an entail has been recorded, there could be no room for such action of damages. While an entail is not recorded, it has not the benefit of the statutory sanction: The entailing clauses are not real or operative against third parties. It is plain, therefore, that they must either work in the way of personal obligation against the heir in possession upon the unrecorded entail, or be of no effective validity at all. If the heir in possession sell the entailed estate, the entail cannot work by irritancy and resolution, as a recorded entail does; for the buyer is a third party, not affectable by the unrecorded clause irritant, and the estate is not left in the heir to be forfeited. It is therefore manifest, that an unrecorded entail cannot possibly work as a recorded entail does, and must operate by personal obligation on the heir in possession, or be of no effective validity at all. It has never however been found, that an unrecorded entail was of no effect. The contrary has uniformly been held as law. We do not think it necessary to go into argument on that point, which we do not believe is now held doubtful by any person. If, however, an unrecorded entail is not wholly ineffectual, but does operate by way of obligation on the heir in possession, it obviously must give rise to an action of damages for contravention, precisely on the same principles on which an entail, with a clause prohibitory against altering the order of succession, or alienating or burdening, but without clauses irritant and resolute, or defective in either of these clauses, gives rise to such action. Indeed, the idea of obligation, without damages for violation of the obligation, seems to us little better than self-contradictory. In this way we think the case of *Ascog* fully applicable as an authority in the present case. It is said the entailer, in making an entail with clauses prohibitory, irritant, and resolute, must have intended that these should operate only in the way of irritancy and forfeiture. We shall not examine whether there be any conclusive reason why this should be held in respect to the prohibitory clause, even in reference to the entail after it is recorded: But in reference to the entail before it is recorded, we think that this is very obviously erroneous. The entailer could not possibly mean the entail, before it was recorded, to operate only by irritancy and forfeiture; because he must have known that, until it was recorded, it could produce no irritancy or forfeiture in the case of contravention the most obvious and probable of all, viz. in the case of sale or other onerous alienation of the estate. With this standing manifest before us, we never can adopt such a construction as to presume, that the entailer intended to deny to the prohibitory clause its natural legal meaning and effect, from absolute reliance on the clauses irritant and resolute, during a period when it was perfectly plain that these clauses were of no effective validity. We have no doubt that the entailer meant that the entail should, before being recorded, have such operation as law would give it; i. e. that it should operate by way of obligation upon the heir in possession, as other imperfect entails do.

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5. We think this question must be answered in the negative. The deed of entail grants 'full power, warrant and commission, to  
' as our procurators, or to any one or other of the heirs  
' of tailzie before specified, to cause present this our disposition of  
' tailzie before the Lords of Council and Session judicially, and pro-  
' cure the same recorded in the Register of Tailzies, and to expedite  
' charters and infestments thereon agreeably thereto, in terms of the  
' Act of Parliament anent tailzies, and that either in our lifetime or  
' after our decease.' The maker of the entail died in 1778, when he  
was succeeded by the late Duke William, who lived till 1810; and  
he was succeeded in this estate by the present Marquis. The entail  
was not recorded till 1818. It has been argued, that as the Marquis  
might have applied to have this tailzie recorded, he is barred from  
pursuing any action founded upon a contravention of it in conse-  
quence of its being an unrecorded entail. We are aware that it is  
the privilege of every heir-substitute to call upon the heir in posses-  
sion to produce and record the entail, under which the one possesses,  
and the other may eventually succeed; and the commission in this  
case does not seem to us to carry this right higher, or to impose any  
obligation upon the substitute heirs, the neglect of which is to import  
a forfeiture of any of their rights. It gives authority to the heirs, but  
it imposes no obligation on them; and therefore we do not think that  
an heir-substitute neglecting this, is guilty of any wrong which can  
bar his action against the heir in possession, or representatives of that  
heir, for a contravention of the entail that is not reducible. Again,  
as to the duty of the heir in possession immediately to record the en-  
tail, we have to observe, that the Marquis was only an heir-substitute  
until 1810, when he succeeded; and therefore, supposing him to  
have presented this tailzie in 1810, on his succession, and recorded  
the same, this would not have prevented the injury of which he com-  
plains through the acts of Duke William. As we think, therefore,  
that the Marquis cannot be barred by his neglect to record while sub-  
stitute, so we also hold it is impossible to refuse to sustain action at  
his instance, because he did not record the entail immediately on his  
succession. Indeed we must observe farther, that the lease objected  
to was granted in 1799. The objection therefore must be, that the  
pursuer did not call upon the late Duke to record the entail before  
that time. Now, we believe the pursuer was a minor at that time.  
Is it to be said, then, that his claim to redress for any contravention  
is cut off by a neglect to record the entail while he was a pupil or a  
minor? Yet it is only this neglect that can possibly be founded on.  
Besides, we do not see how the failure of the pursuer to record this  
entail can be pleaded by the representatives of the former heir, who  
was equally a wrong-doer, as a bar to his claim of damages against  
them. If the pursuer, by succeeding to an estate with the entail un-  
recorded, has charged it with his own debt, the future heirs will be  
entitled to claim damages to this amount from him; and this claim at

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the instance of the subsequent heirs, seems a strange defence in the mouth of the representatives of the former heir, against a claim for a similar contravention; since, to deprive the pursuer of his right of action, would just so far lessen his power of repairing the injury done by him to the subsequent heirs. In truth we must repeat, that the commission does not seem to make the case stronger than if it had been left to the ordinary rule of law, which authorizes any heir, however remote, to call for production of an entail in order to its being recorded; so that if the clause affords a good personal exception against the claim in the present instance, we think it must equally operate in every case of a perfect entail which has not been recorded; and thus the only mode of completing an entail would be by the entailer recording it in his own lifetime. The clause of the entail in question, which requires that the next heir, after an irritancy has been incurred, shall pursue a declarator of irritancy and contravention, and procure himself to be infeft in the lands, and provides that, failing to do so, he shall, for himself only, lose his right to the estate, has also been referred to as affording a personal exception against the pursuer. We are of opinion, that it would be competent only for a subsequent heir to pursue a declarator of irritancy against the pursuer, founded on this clause, and that it is *jus tertii* to any other party, a stranger to the estate, to found on it. We think the intention of this clause was to compel the substitute heirs of entail, as far as could be done, to bring declarators of irritancy within a certain time, but not to take away their right of doing so after the time had elapsed. Besides, it appears inapplicable to the circumstances of this present case, where, from want of recording prior to the act of contravention, it was not possible to bring a proper declarator of irritancy, *i. e.* an irritancy of the deed in contravention, by which the entailed estate might be purged and restored to its integrity. And here, again, there might be question from the minority of the Marquis, which, we believe, existed at the time of the contravention. And, on the whole, we do not think these latter objections to the title of the pursuer, more recently insisted on, are solid.

LORDS PITMILLY and MEADOWBANK.—We concur in the foregoing opinion.

On advising these opinions this interlocutor was pronounced :—  
 ‘ The Lords, considering that the Opinions returned by the Lords  
 ‘ of the Second Division, and the permanent Lords Ordinary, do  
 ‘ not exhaust all the questions remitted by this Court for their con-  
 ‘ sideration; and that, in the event of their answers to the ques-  
 ‘ tions not being agreeable to the opinions of the majority of the  
 ‘ whole Judges, it might become necessary that their Lordships  
 ‘ should give their answers to the other questions; of new remit  
 ‘ the questions to their Lordships, and request that they may re-

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‘ turn their opinions upon the remaining questions, not included  
 ‘ in their answers referred to, and that, as soon as the same can  
 ‘ be conveniently done by their Lordships; and, further, appoint  
 ‘ the whole printed papers in the cause, and printed copies of this  
 ‘ interlocutor, to be forthwith put into the boxes of the Judges to  
 ‘ whom the present remit has been made;  
 ‘ In consequence of this remit, these Opinions were given:—

LORDS PITMILLY, MEADOWBANK, MACKENZIE, and LEITCH.—  
 Although it appears to us that we have already answered all the ques-  
 tions put to us in this case, we again give it as our opinion,

1. That the summons is competent.
2. That an inquiry being instituted as to the true annual value of the farm at the time of entering into the lease, the difference between such value and the rent stipulated is, the loss or damage actually sustained by the heir first succeeding to the grantor of the lease; and if that heir does not outlive the lease, the same will, in like manner, be the annual loss of the heir or heirs who may possess till the issue of the lease.
3. That until an action for this damage has been raised, any heir in possession is entitled to bring a claim against the representatives of the contravener, for the loss or damage, from the commencement of his own possession, and during the currency of the lease; also, retrospectively, for the loss during the possession of a preceding heir, if he be the representative of that preceding heir; but after the damage has been ascertained at the instance of the heir in possession, it is not competent for any succeeding heir to institute a similar action.
4. That where an entail, though complete in its restricting clauses, has not been recorded, an action of reparation or damages in the case of a contravention may be competently instituted against the representatives of the contravener.
5. That the pursuer in this case is not barred by any personal objection from instituting such an action.

LORD BALCANHAL—In considering this case, the Court must have due regard to the questions and information requested by the House of Lords, and to the opinions laid before us by the other Judges.

With respect to the questions which have been put, I am of opinion,—

1. That the summons or action instituted is competent to be entertained by this Court, in the sense in which the word competent is understood by the law of Scotland;—that is to say, that the Court is bound by law to hear the demand of the pursuer, and is bound to call on the defenders to obviate the demand, if they can. No doubt, the pursuer may be barred from insisting in his demand, and in that sense the action may be said not to be competent; but that does not properly apply to the competency of the action.

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2. I also humbly think, that there can be no sort of difficulty in ascertaining the loss or damage sustained by an heir of entail in claiming under a contravention such as has been alleged. The true annual value of any farm at any given time can be easily ascertained, and the difference betwixt that value and the stipulated rent is the loss or damage to be repaired. For the heir in possession will draw, as long as he lives, during the subsistence of the lease; and if a new heir succeed, he will be entitled to draw the same rent, and so on successively, till the right expires. As the value of the corn produce is annually ascertained by public authority in every county of Scotland, and the value of other produce also well ascertained, there is no practical difficulty in fixing the value of any farm; and in such a case as the present, there can be no difficulty in ascertaining the loss or damage to any heir of entail, whatever be the endurance of the lease.

3. According to the principles of the entail law in Scotland, when a *jus crediti* is created to every substitute heir of entail, however remote, he is entitled, upon contravention by an heir in possession, to bring an action to obtain redress; and this action is for the common benefit, and for the protection of the general right conferred by the entailor. Of course, it necessarily follows from this, that if a succeeding heir finds it necessary to bring an action against the representatives of his predecessor for the reparation of any wrong that had been done, he is the dominus of the estate, and is, by the law of Scotland, considered as the representative of the whole body of heirs, and he is entitled to insist for reparation in his own and in their rights;—and consequently, what belongs to himself he will appropriate to his own use; and what may pertain to his successors, or rather to the estate itself, he is bound to preserve, and protect for the use of the other substitutes. Such being the nature of the right of an heir of entail, and his duty in prosecuting all contraventions, and from all other substitutes being in the eye of law entitled to appear and to concur with him in such prosecutions, it is perfectly plain that the representatives of a contravener never can be subjected to successive demands of succeeding heirs to repair any damage or any loss which has been already determined with a predecessor. It is always to be recollected that although heirs of entail do not represent one another, but merely represent the entailor, yet where an heir of entail acts in the proper discharge of his (duties) rights under an entail, he binds all the succeeding substitutes; and of course, in such a case as the present, if the damages have been ascertained at the instance of the heir in possession, it is not competent for any succeeding heir to institute a similar action.

4. I am also humbly of opinion, that as an obligation is always created by a prohibitory clause, and that although the Act 1685 entitles proprietors to protect these obligations by irritant and resolute clauses; yet when these become insufficient from the circumstances of the case, action of reparation or damages in the case of contravention

July 16. 1890. may be instituted against the representatives of the contravener. It is even apprehended that this would be competent against the contravener himself, even supposing that the irritant and resolute clauses were enforced against him. For instance, suppose an heir of entail, contrary to the prohibition in any entail, should pull down the family mansion-house, and sell the whole materials, it is apprehended that he would not only forfeit the estate, but he would be bound to repair the positive loss which he had occasioned. The same thing would also occur in all cases of direct and deliberate waste; of which many instances could be pointed out. If this could be done against the contravener himself, much more must it be competent against his heirs and representatives, when there no longer exists any room for insisting upon the irritant and resolute clauses. In fact, in the case of leases, of which there is no legal record, and where the substitutes have no right to interfere in the ordinary administration, it is impossible to discover, till the death of the heir in possession, what is the contravention that has been committed.

5. I am humbly of opinion, that there is nothing occurring in the present case on the part of the pursuer, which can bar him from insisting in his present action. If the pursuer has contravened any part of the injunctions of the entail, he in his turn will be amenable to the succeeding substitutes; but third parties are not entitled to vindicate their rights, or to compensate the wrong which their predecessor has committed, with the wrong committed by another.

What has now been stated relates merely to the general questions of law, in which the majority of the consulted Judges appear to concur. There still remains a material part of the facts of the case, as to which there seems to be required a great deal more explanation and investigation, before the Court can arrive at any determination. In the present case it is admitted on all hands, that there was no direct diminution of the rental. It is also admitted, that no grassum was taken. In short it is admitted, that nothing was put directly into the pocket of the late Duke. It is also to be remembered, that he was the dominus of the estate, and had, to a certain extent, the uncontrolled management of the property. It is also to be kept in view, that during the period that the late Duke possessed the estate, the most extraordinary variation occurred in the value of landed property in Scotland, and that even during the subsistence of the leases in question. It therefore becomes a question of very considerable difficulty to decide, what a prudent proprietor ought to do under such fluctuations. For these reasons it appears to me, that it would be proper for the Court to direct the parties to give in Cases directed to the facts which are respectively alleged by them, accompanied by condescendences of what they offer to establish by proof; as vague allegations with respect to the value of land ought not to be regarded in a matter of the kind, particularly as so much speculation has taken place in Scotland in this matter; and of course, what any tenant may have offered for land,

or even may have paid for a time, is no just criterion of its proper permanent value. July 16. 1890.

LORD CRAIGIE.—I am entirely of the same opinion. In a question between the heirs themselves, if one heir, when in possession, does an injury to the estate to the prejudice of the other heirs, he may be liable in damages upon that fact.

LORD GILLIES.—I felt a difficulty upon this case from the decision in the case of Ascog, in which I differed in opinion from the judgment that was pronounced. I considered, that where an entail was fortified by irritant and resolutive clauses, it must just work its own way; but your Lordships found, that although it was an imperfect entail, yet it was obligatory inter heredes, and I think the same principle must apply here.

I concur in the opinion which has been given by Lord Mackenzie, and the other Judges who concur with his Lordship.

But upon the last point, viz. whether in this case the executors are liable, or what may be the extent of their liability—I think there is very great difficulty, and upon which I think we may still require to take the opinions of the other Judges.

Suppose the late Duke of Queensberry had derived an immediate and direct advantage from the transaction, then the executors might have been called upon, because the funds would have been thereby increased; but that is not the case here. The Duke of Queensberry got no advantage by the transaction, and I doubt much if the executors can be liable where they derive no benefit. Suppose all the opinions regarding the competency of the action were right, and that a claim for damages lay, there still remains the question, whether, in the circumstances of this case, the executors are liable for these damages? and upon that point I am not prepared to give any opinion at present.

LORD PRESIDENT.—I concur in the opinion expressed by your Lordships; but, with regard to the last point mentioned by Lord Gillies, it would be better either to order Cases, or to remit to the Lord Ordinary to hear parties further upon that point.

The Court then pronounced this judgment:—‘ Find, agreeably to the opinions of the majority of the whole Court, 1mo, ‘ That the present action is competent by the law of Scotland, ‘ and that the pursuers are thereby entitled to state their demand. 2do, That where an heir of entail grants a lease at ‘ an undervalue in point of rent, contrary to a prohibition in ‘ the entail, and which lease cannot be legally reduced, and ‘ when it is established that the prohibition is contravened, the ‘ damages are to be estimated and measured by the difference of ‘ rent, between what has been fixed by the lease and what the ‘ lands would have given if let in terms of the entail, secundum



July 16. 1890. 'arbitrium boni viri,—and the heir of entail in possession will be entitled to draw, during the subsistence of his right, that difference of rent from the heir of the contravener. But every substitute heir of entail has such a jus credit under the deed, as makes it competent for him to institute and maintain any action for damages, where a prohibition has been contravened; and where such action is instituted, the same is to be considered for the benefit of all concerned; and that, if a difference of rent is fixed in a suit at the instance of an heir of entail in possession, who is dominus of the estate, and representative of the other heirs, against the heirs of his predecessors, the same will regulate the right of the succeeding heirs, who after wards come into possession; providing the endurance of the lease—and they will be entitled to draw in their order, according to the nature and extent of their right to the same, such surplus rent as may be fixed in any such action; and that, after the damage has been so ascertained by the instance of a proper party, it is not competent for any succeeding heir to institute a similar action. 4to. That although an entail be complete in its restricting clauses, yet an action of reparation or damages in the case of contravention may be competently instituted against the representatives of the contravener, so as to make up any loss which cannot be obtained by the immediate operation of such restricting clauses. 5to. That the present pursuers are not barred by any personal objection from instituting the present action, and from demanding indemnification from the representatives of the late heirs. And further, with reference to the question, whether such an action lies where the heir is not lucratus? the Lords remitted Lord Meadowbank's Ordinary, to prepare the cause, and to report to the Court.

The Duke of Queensberry's executors appealed, and both parties again maintained the same pleas which had been formerly urged (ante, vol. ii. 265), and as to which the remit had been made.

For the Duke of Queensberry's executors. With respect to the Queensberry case, which has just been argued, it differs in this respect (I mean regarding the argument as the law) from the two cases of Stewart v. Fiddlart and Bruce v. Bruce, that there is no prohibition against letting of leases; and that suggestion from the bar appears to me to deserve a great deal of consideration, because unquestionably

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the evidence of non-imputation of intention has been carried to the utmost length. This, in a case which has been cited, the institute in an entail was named, I know not how many times over, under the expression of 'institute and other heirs of entail,' from which it would have been implied, unquestionably, in the construction of any deed but a deed of Scotch entail, that the entailer understood the institute to be one of those heirs of entail, and which, if he had been so understood to be by implication, all the fetters would have been just as completely taken to be imposed upon him as upon the heirs of entail. But though he had been spoken of in conjunction with other heirs of entail, by those repeated expressions in the instrument of entail, the institute and other heirs of entail, yet this House refused to consider that the institute was, by implication, to be taken as an heir of entail, within the intent and meaning of the author of that deed. It is therefore absolutely necessary that we should decide, with respect to the Queensberry estate, whether there is, or is not, strictly speaking, and without the aid of any implication, a prohibition, or a clause in the nature of a prohibitory clause, to prevent the heirs of entail making such leases as were made in this case. My Lords, I pass over at present, because I do not well understand the grounds of decision in the Court below, how it happened that it was thought grassums were not objectionable—I mean, not objectionable with a view to the question, whether, with respect to them, there was not a diminution of rent? Because, to be sure, if a man lets an estate worth £1,000 a year for £1,500 a year, and takes a grassum of the value of £1,000, he gains for a certain series of years, it would be said that that tends to diminish the rental by the taking of the grassum; or, in other words, that the tenant purchased, by the grassum, so many years' enjoyment of the land as the grassum, in consideration of which the rent was reduced, amounts to.

My Lords, with respect to this case I shall say no more at present, than that it may be my duty to explain pretty largely hereafter, (having been concerned in making that remit, to which reference has been made, to the Court of Session), the embarrassment this House was under with respect to this case. I hope I shall do it satisfactorily, after looking back to what was said upon the subject. There are very many cases, and it is exceedingly difficult to reconcile the recent decision that the House came to in respect to the Duke of Buccleuch's case—the difficulty, perhaps, arises in one's mind and head, because one cannot help feeling that there is a moral right which one would wish to carry into a legal right; but, in speaking that attempt, we must not go farther than the law will enable us to do. My Lords, we should hope that, in the course of a very short time, we shall be prepared to decide these cases; and would request, that in the meantime the gentlemen who may be in possession of the notes of speeches made in this House, will have the goodness to furnish them, as far as they can, to the person

July 16. 1830. who is now addressing the House. I should feel that to be a very considerable obligation conferred upon myself.\*

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EARL OF ELDON.—My Lords, This case, in different shapes, has been before your Lordships several years. The summons recites a deed of entail, (a copy of which I now hold in my hand), which was executed by Charles Duke of Queensberry and Dover, who, after making several limitations, and describing a great variety of property which was to be included in this entail, annexed the following conditions, one of which is, that the heirs succeeding by virtue of this tailzie shall be bound and obliged to pay the entailor's debts, so far as they shall not be recoverable from his unentailed or personal estate. Then follows this clause: 'And with and under this restriction and limitation, that the whole heirs aforesaid are and shall be limited and restrained from selling, alienating, impignoring, or disposing the said lands and estate, or any part thereof, either irredeemably or under reversion, and from burdening the same in whole or in part with debts or sums of money, infestments of annual rent, or any other servitude or burden whatever, (excepting only as herein after-mentioned), and from doing or committing any act, civil or criminal, and granting any deed, directly or indirectly, whereby the said lands and estate, or any part thereof, may be affected, apprized or adjudged, forfeited, become escheated or confiscated, or any other manner of way evicted from the said heirs of tailzie, or this present tailzie prejudged, hurt, or changed.' There is then the following restriction, on which the question arises, as to the power of granting leases: 'With and under this restriction, that it should not be lawful to any of the said heirs to set tacks or rentals of the said lands, or any part thereof, for any longer space than nineteen years, and without any diminution of the rental, or for the setter's lifetime in case of any diminution of the rental; and that it shall not be lawful to any of the heirs to take grassums for any tack or rental to be set by them,' (grassums, your Lordships know, are slump sums of money for renewals at a smaller rent), 'but to set the lands and estate at such reasonable rents as can be got therefor, so that the succeeding heirs may not be hurt or prejudiced by the heir in possession selling the lands at an undervalue, or taking, by way of grassum, what falls annually to be paid out of the produce of the lands.' Then there are irritant and resolute clauses. And there is this peculiar clause: 'That in case any of the heirs hereby called to the succession of our said lands and estate, shall incur any of the irritancies contained in this present tailzie, the heir next called to the succession shall be obliged to prosecute and follow forth a declarator of irritancy and contravention, and to procure him or

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\* The further consideration of the case was then postponed to this day.

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‘ herself infest and seized in our said lands and estate within the space of two years after the former heir has contravened the conditions or restrictions before or after written, or any of them ; and in case the next heir shall neglect to pursue the declarator of irritancy, and obtain himself infest as aforesaid, the said heir so contravening, by neglecting to pursue such declarator, shall, for him or herself only, forfeit, amit, and lose the right to our said lands and estate, and the same shall fall to and devolve upon the heir next called to the succession, who shall prosecute the foresaid declarator of irritancy ; but all the heirs aforesaid succeeding upon any contravention, and heirs succeeding to them, shall be subject and liable to the same conditions, restrictions, and irritancies, throughout the whole course of succession, for ever.’ Your Lordships will observe, that these are very particular clauses ; for there are not only irritant and resolute clauses, but your Lordships will find that it is incumbent upon the heirs next in succession to follow forth a declarator of irritancy and contravention within two years after the former was contravened, under the conditions and restrictions before and after written, otherwise he shall lose his right to the estates, and the same shall devolve to the next heir. This declarator of irritancy and contravention is to be prosecuted by the heir in possession ; and if he does not do that within two years, he is himself to be considered as a contravener ; and those who come after him may deprive him in the same manner for his contravention, as it was intended by the author of this deed that he should be able to deal with the heir before named who had so contravened. Your Lordships are aware, that, according to the law of England, (which appears to me to be much better in this respect than the law of Scotland), if a person becomes, by limitation, the absolute owner of an estate, if you attempt to restrain him from making leases, you make an attempt which is repugnant to the very nature of the estate given to him, and that will have no effect at all. It is clearly otherwise in the law of Scotland ; for though you make the person the absolute fiar of the estate, you have a right, by those irritant and resolute clauses, to reduce him to the situation of a very limited owner of that estate, although, by the first clause in the instrument, he was to become the fiar of the lands. It is the case in England, too, that whenever a lease which is made is not according to the terms of the settlement, and which is to the prejudice of the tenant for life, the next taker has nothing to do but to prove that that lease is not made according to the terms of the settlement, and thereby he sets aside the lease ; and he has in that case a power to go back for gone-by rental a particular period—six years, I think it is. This is not so in the law of Scotland. The allegation made in the summons was, that the person in possession had let a lease that he was not at liberty to let ; that it was let for an undervalue, and (so to express myself) not let for such a reasonable rent as at the time of making the lease he might have obtained for his own benefit, and the

July 16. 1830. benefit of all to come after him. And I believe the simplest way of construing the clause which is contained in this deed of entail about leases, is to hold that the author of the deed intended to impose upon the substitute, whether he was, or whether he was not, the obligation to obtain the lease, and to obtain it at such a reasonable rent as could be obtained at that time of making the lease, and to obtain it there are different opinions as to the construction of that clause, and that appears to me to be the proper construction of the clause. The parties went on then, in the summons, to state the matter thus, and that the said William Duke of Queensberry did, in the year 1799, enter into a lease with David Stairs, by which Stairs, on the one hand, compounded the lease that had been granted to him in the year 1796; and on the other hand, the Duke granted to him a new lease of the said lands and farms for 99 years, at the yearly rent of £140, being the same rent as was payable by the former lease, although at that time the lands, and the wife worth £1500, sterling, of yearly rent, by which means the lease was prolonged for thirty years, to the great prejudice of the Marquis. It is then stated, that, "the entail had not been recorded in the Register of Sasine when the lease was granted as aforesaid by the Duke; and thus the tenant acquired right to possess the lands and farm in virtue thereof, notwithstanding the Duke, by granting the same, had contravened the entail; and nevertheless, the executor and personal representatives of the Duke were liable to the pursuer for all loss and damage which the said Marquis pursued; and obtained by and through the granting of the said lease, and then it is prayed, that the damages which he sustained himself to be entitled to a sum of about £5000 sterling, might be awarded, together with the usual interest on the sum, and the expenses, both of pursuer and defender, and there were afterwards additional defences put in for the executor of the Duke of Queensberry, and with respect to material part of those additional defences, they state that the action brought is incompetent, upon the following additional grounds; besides those stated in the original defences. These stated in the original defences were,— "That supposing the action was liable to no objection on the ground of competency, there was no ground for submitting the pursuer to damages on account of the loss complained of; that the verdict that the Duke, in granting the lease, was actuated by a fraudulent intention to injure his co-possessor in the estate; and that the Duke had no such intention; and that the defender did the pursuer to prove that the said Marquis was liable in the summons, that the said sum was worth more than the rent payable by the lease; and that the pursuer was not entitled to be held that the defender (the entail) was bound to let at reasonable rents, yet the Duke was entitled to use his discretion in judging of what was reasonable; and that if he reserved as much to his successors as he did to himself, he must be held to have fulfilled his obligation: that

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'it was not incumbent on him to obtain the highest rent which might  
 'have been got on a competition, and that still less was he bound,  
 'under the pain of damages, to obtain the utmost which any specu-  
 'later might choose to think was the worth of the farm at the time.' My Lords, in observing on the heads of defence, I would state, that it is my humble opinion, that the pursuer would obtain such a rent as would be a reasonable rent for it at the time; and that the question is, What is the rent which might reasonably be obtained at the time? To be sure that ought to be considered with all due advancement. A Court ought not to set aside a lease on account of a firm party, not having got the utmost for things, but it should be allowed which can be reasonably obtained by ordinary diligence, so as to give to the persons entitled to the estate the benefit of that estate. My Lords, the additional defence stated, that the action was incompetent, upon the following grounds:—The deed of entail under which the pursuer has succeeded to the finewald estate, contains certain irritant and resolutive clauses, declaring, that any heir who shall contravene the conditions of the willie should forfeit his right to the estate, and that the acts and deeds done in contravention should be void and null. But these are the only penalties which the deed of entail has annexed to any act of contravention, and it does not contain any condition or declaration whatever, imposing that the representative of any heir who should possess the estate should be liable in damages to him exceeding his balance due of any alleged act of contravention. It would therefore be plainly inconsistent with the known rules of interpretation applicable to rights of this nature, to allow the pursuer, in the present case, to demand separation from the defender on account of an alleged act of contravention on the part of, their author, while the only deed under which the pursuer has right to the estate gives no satisfaction whatever to any such demand. If, in consequence of the entail not being then recorded, the pursuer cannot avail themselves of this only mode of redress which would have been competent to them against the alleged act of contravention, they have themselves to blame for not having insisted upon the entail being recorded during the lifetime of the late Duke of Queensberry. After the summons and these answers had been put in, there was an interdictum ordering condempnence and answers. It is not necessary for me to state to your Lordships the nature of this long condempnence, and these very long answers. It will be in your Lordships' recollection, that when this case was argued at the bar, there were several observations made on the case of the pursuer—what ought to be expected of him, regard being had to the advantages which he had received from certain deeds and transactions, with respect to this estate; but it is sufficient to say, that we have nothing to do, I apprehend, with the question, whether the pursuer's conduct has been commendable or otherwise? My Lords, after the Counsel had been heard on the condempnence and answers, mutual informa-

July 16, 1890. tions were prepared to the First Division of the Court, on advising which they pronounced the following interlocutor:—‘ Upon report of Lord President, in absence of Lord Meadowbank, Ordinary, and having advised the mutual informations and other papers given in by both parties in this cause, the Lords find the present action competent; repel the additional defences, and remit to the Lord Ordinary to proceed accordingly.’

My Lords, there was an appeal to this House against this interlocutor, upon which the judgment of this House was pronounced so long ago as May 1896. Your Lordships, however, will permit me to observe this short ground, that the House was very much disturbed, at the period, by the doctrines in the Ascog case, and various other cases and questions, whether, where there were obligations, irritant and resolute clauses, these were to be enforced by inhibition; or whether the remedies given by the deed of entail itself, were not remedies which ought to be pursued in the case of an alleged breach of the conditions, &c. that were imposed by the deed of entail? And, under the circumstances of difficulty which the House was under with respect to regulations of this nature, the judgment of the House was,—(Here his Lordship read the judgment quoted p. 254.)

My Lords, unquestionably it was the feeling of this House, and that feeling has been rightly understood, that when the cause was remitted back to the Court of Session in Scotland, they were to review the interlocutor. It was meant, not merely that the Court of Session should consider the difficulties in respect to damages, but they were to review the interlocutor itself, having regard, among all the other considerations, (and the remit calling upon them, in the review, to attend to this consideration), how the damages were to be estimated. And I think I do not misrecollect what passed, when I state, that the Counsel at the bar were questioned at several periods with respect to those damages, and were requested to inform us how, according to their notions and speculations, the damages might be assessed; or to inform us, if they could inform us, by any decision, how such damages had been assessed; but they were not able to give any satisfactory answer to those questions, notwithstanding those questions were propounded to them by the House.

My Lords, the case having gone back again, it has produced great difference of opinion among the learned Judges. I observe, that those who have concurred in the opinion that this action cannot be sustained, state great difficulties with respect to the assessing the damages in certain cases, particularly one learned Judge, I think my Lord Cringletie, in his judgment;—and, on the other hand, there were four Judges who held the obligation to be competent, and who do not feel this difficulty about estimating the damages, because the last heir lived beyond the duration of the lease. That circumstance does not seem quite to remove the difficulty; because, if the heir was to have damages assessed at the period when his right was infringed upon, it does not follow that because he actually outlived the lease, that he has lost

his right. The heirs succeeding one another from time to time, it July 16. 1830. appears to be the opinion of the Judges of the Court of Session, that the damages should be equal to the buying an annuity—the amount of which would be the difference between the annual amount of that reasonable rent which might have been obtained at the time the lease was made, and the lower rent which had been obtained when the lease was made—and that that annuity should be paid, from time to time, to the heirs succeeding to the estates. Now, my Lords, it does occur to me, I confess, that there are a great many difficulties altogether unremoved by this mode of stating the matter. It is not necessary to go through them; but I think, when one comes to consider what questions might arise, there are a great variety of cases which this mode of solving difficulties, in the particular cases alluded to, would not enable us to get over with that judicial certainty which we ought to have. The points I am now alluding to are discussed in the different opinions given by the Judges: It is not necessary to go through the propositions which those respective Judges state;—there are many of them very largely discussed in the arguments at the bar in the Ascog case. It appears that the Ascog case had engaged the attention of the Court of Session a great many years, and had engaged the attention of this House for a great many years. It was most elaborately argued at the bar, and it was not only most elaborately argued at the bar of this House, but most elaborately argued in the Cases laid on your Lordships' table, and in the judgments of the respective Judges of the Court of Session; and your Lordships were finally of opinion, and I repeat my own humble opinion, that the deed in the case of Ascog was the rule by which the Court ought to proceed, and that it never could have sustained such a proposition as this, that a man having made such a deed as that in the case of Ascog, by which it was found that he meant to allow a sale to be made of the estate,—which we must take him to have intended, because he has not so prohibited the sale by the irritant and resolute clauses as to prevent its being made;—yet that he meant, on the other hand, that there should not be such contravention, though it was not met by the provisions in that deed, but that, with respect to that deed, though he did not prohibit the sale to be made, and, in fact, the party might sell—yet that there should be satisfaction in this way, that the money should be laid out in the purchase of another estate, to be settled to the same uses, which, the moment it was settled to the same uses, might be again sold.\*

My Lords, on referring to the different judgments which have been given by this House, and by the Court of Session, it is impossible that they can all stand; and the question is, which of

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\* The speeches of the Judges of the Court of Session in the Ascog case, have been (in order to make the reports of these three cases complete) inserted in the Appendix, No. I.



July 16. 1830. those judgments appear to your Lordships to be the best founded? And, in determining that question, we must refer to the principles on which they have proceeded, having reference, at the same time, to the particular provisions on which the questions have been raised;—and, under those considerations, we must endeavour to come to the correct result. My Lords, in this case, it is very true that the pursuer might not know that such a lease as this had been granted; but, on the other hand, if the party claiming under the entail has been defrauded, he is entitled to his remedy. The question is—Whether he has so been defrauded? My Lords, I regret that there should be so great a difference of opinion between the learned Judges in the Court of Session. In such a state of things, I must agree with some of them, and disagree with some of them; and all I can do is to examine most carefully which of them appear to me to give the most satisfactory reasons for their opinions; and my conclusion, upon the whole, after a great deal of consideration of the subject, has led me to submit to your Lordships my opinion, that this judgment ought to be reversed.

LORD CHANCELLOR.—My Lords, It is unnecessary, after the very able manner in which this case has been stated by my noble and learned friend, that I should follow him through his statement. I have also studied with great attention the judgments of the learned Judges in the Court below—I have attended minutely to the arguments which have been urged at your Lordships' bar—I have read with great attention the arguments in the pleadings; and it is sufficient for me to state, that I entirely concur in the opinion which my noble and learned friend has expressed; and I therefore second the motion of my noble and learned friend, that this judgment be reversed.

The House of Lords accordingly ordered and adjudged, that the interlocutors complained of be reversed.\*

*Appellants' Authorities.*—Earl of Wemyss and March v. Duke of Queensberry's Executors, Jan. 14. 1823, (2. S. & D. 107.); March 10. 1824, (2. Shaw's Ap. Ca. 70.) Duke of Buccleuch, Nov. 13. 1822, (2. S. & D. 6.); Feb. 1. 1826, (4. S. & D. 442.) Bryson, Jan. 22. 1760, (15,511.) Lord Annetville, Aug. 8. 1787, (2010.) Lockhart, Jan. 11. 1811; Hope's Min. Prac. p. 403; Stair, 2. 3. 59. Binney, Jan. 28. 1668, (4304.); Stair, 4. 13. Clauses [misprint]; Ibid. 2. 1. 23.; 1. 9. 30. Bankton, 1. 3. 152. 158. Hamilton v. M'Dowall, March 3. 1815, (F. C.)

*Respondents' Authorities.*—Kames' Law Tracts, p. 144.; Dalrymple on Feudal Property, p. 139.; Hope's Min. Prac. 16. 9. 13.; Mackenzie, ii. 400.; Stair, 2. 3. 59.; Ersk. 3. 8. 23. Bryson, Jan. 22. 1760, (15,511.); Hope's Min. Prac. 16. 11.; Mackenzie's Institutes, 3. 8. 11.; Ibid. on Tailzie, ii. 489. Gibson, Nov. 24. 1795, (15,869.) M'Nair, May 18. 1791; Hall's Cases, 546.;

\* In the Appendix, No. II. will be found a note by the late Mr Chalmers, (communicated to the reporters shortly before his death), of the principles fixed by the recent decisions on entail questions.

Elchies on Stair, p. 110.; Ersk. 3. 8. 23.; Bankton, 2. 3. 130.; 3. 8. 27. July 16. 1830.  
 Willison, Feb. 26. 1784, Dec. 12. 1784, (15,869.) Hall, Feb. 1728, (15,873.)  
 Gordon, Nov., 21, 1752, (10,258.) Chisholm, Feb. 27. 1800, (Nov. 6. App.  
 Thilgie), Stair, 1. 3. 3.; Ersk. 3. 8. 23.; Stirling, Feb. 2. 1728, (15,873.);  
 Feb. 25. 1730, (Craigie and S. 34.) Young, Nov. 13. 1761, (5. Brown's Sup.  
 p. 884.); Gordon, July 29. 1761, (15,513.) Sutherland, Feb. 6. 1801, (No. 8.  
 App. Thilgie). 1801, June 11. 1811; Elchies on Stair, p. 114.; Bankton,  
 2. 3. 130.; 3. 8. 27.; Bankton, 2. 3. 130.; 3. 8. 27. July 16. 1830.

**GEORGE ROSS, Respondent.**—**Brigham—Kearney—Dundas**

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**GEORGE ROSS, Respondent.**—**Brigham—Kearney—Dundas**

No. 35.

July 16. 1830.

2d DIVISION.

THE late Alexander Ross was by birth a Scotchman, and went in early life to London, where he settled in business as an agent. He succeeded in the year 1786, in the entails of Cromarty in Scotland; and he also inherited a paternal estate called Overkirk, and was enrolled as a freeholder in two of the counties of Scotland. After he went to England, his residence was either in London or its neighborhood. He married a lady in England, but she died in April 1809, without being survived by a son. He then formed an illicit connexion in London with an Englishwoman, Elizabeth Woodman, (who assumed the name of Mrs Saunders, being the Scotch for his own name, Alexander), by whom he had a son, (the respondent), born in London in February 1811. Mr. Ross was in the custom of making occasional visits to Scotland for various purposes, such as voting as a freeholder at elections, letting the leases on his estate, amusement, or seeing his friends. In May 1815 he took lodgings at Newhaven, near Edinburgh, and arrived there on the 25th, with

July 16. 1830. Elizabeth Woodman and the respondent. He was regularly married to her at Leith on the 10th of June 1815; and after remaining some weeks at Newhaven, they went to the estate of Cromarty, accompanied by the respondent. They resided there till about the end of August, when they returned to London, where Mr Ross continued almost uninterruptedly till his death in that city in 1820. Subsequent to the marriage, the respondent was treated by his parents as their lawful son, and was acknowledged as such in the settlements of his father, which were executed by him in Scotland according to the forms of the law of Scotland. His widow was also found entitled to terce, &c.

The respondent, under the name of George Ross, and describing himself as the only lawful son of Alexander Ross, then took out a brieve for the purpose of having himself served lawful heir of tailzie to his father in the estate of Cromarty. Under that entail, the estate is descendible to heirs-male of Alexander Ross, whom failing, to the heirs of a party, now represented by the appellant Mrs Rose. That lady immediately executed against the respondent a summons of bastardy before the Commissaries, setting forth, that Alexander Ross having died without heirs-male lawfully procreated of his body, she had right to the estate of Cromarty as nearest and lawful heir of tailzie; averring, that the respondent was a bastard, seeing that he was begotten by Alexander Ross, a domiciled Englishman, in fornication with an Englishwoman, and born a bastard in England; and concluding, that it should be found and declared accordingly.

The Commissaries, after allowing a proof, found, on the whole ' facts of the case, and in respect that no sufficient grounds have been alleged for denying to the defender the benefit of legitimation by the subsequent marriage of his parents, as recognized in the law of Scotland, assoilzied the defender.\*

The appellant having presented a bill of advocacy, the Lord Ordinary reported the case; and, after a hearing before all the Judges, the Lord Ordinary, as advised by the Court, refused the bill, and the Court, on review, adhered.†

\* See the opinions of the Commissioners laid before the House of Lords, Appendix, No. III.

† 5. Shaw and Dunlop, 605.—The Opinions will be found in the Appendix, No. IV. Lords Justice-Clerk, Glenlee, Craigie, Balgray, Gillies, Pitmilley, Alloway, Meadowbank, Mackenzie, and Medwyn, were in favour of the judgment. Lords President, Cringletie, and Eldin, dissented.

Mrs Rose appealed.

July 16. 1890.

*Appellant.*—1. The question is, What is the legal effect of the subsequent marriage in Scotland, where the child was begotten and born in a foreign country. By the law of Scotland, an effectual marriage is constituted by the interchange of consent *ad ipsum matrimonium*, and the law, from the posterior public celebration, infers a prior private interchange. The latter is held to be the true period of the nuptials, and thus the subsequens matrimonium works not to make the child which was a bastard a lawful child, but to declare that the child which, until the public celebration, had been erroneously reputed a bastard, was, and had been, from the first carnal intercourse of the parents, lawfully begotten. But this is a mere presumption, which rests on the fact that there was no impediment which prevented the practicability of that private interchange of consent of marriage. If there were such an impediment, as for example an intervening marriage, there is no room for the presumption; and posterior marriage between the parents will not legitimate the child, who cannot, from the circumstances in which his parents stood, be any thing but a bastard begotten. In like manner, since marriage is not, and cannot be constituted by mere interchange of consent in England, the child begotten in England must have been begotten in fornication. The presumption arising from a public ceremony in Scotland, that the bastardy was a mistake, and that truly from the beginning the child was lawful, cannot be admitted. The fact, in such a case, overcomes the presumption. It is an erroneous view to treat this presumption of the private interchange of the matrimonial consent, and the consequent constitution of matrimony, as a mere fiction, and to maintain that all inquiry whether there was a possibility of a consent is excluded. It is a rational and useful rule. The law lets in a presumption of a doubtful fact, of which, from its very nature, no direct evidence can generally be obtained; but a wise limit is placed to this indulgence, and wherever there is an impracticability of the event having happened, then the presumption will not apply. The law deals in fiction when it assumes as true some fact which certainly did not happen, in order to let in an equity which could not otherwise touch the real circumstances of the case. But it deals only in presumptions, where, in a doubtful case, and in default of conclusive evidence, a fact which is likely to be true, or for the evident interests of society it is wise to be inclined to believe to be true, is taken to be true. In a fiction, the law will exclude the inquiry of possibility or impossibility. In

July 16. 1830. a presumption, the law admits the objection of impossibility, and allows an inquiry into the fact. Besides, this is a Scotch presumption, unknown to the law of England, and cannot be extended beyond the territory in which the presumption is recognized. But, in the present case, the parties were undoubtedly domiciled in England at the time of the procreation, and consequently the Scottish rule, that the interchange of the matrimonial consent then took place, cannot be admitted. But the respondent was not only begotten illegitimately, he was also born a bastard; because his parents were resident and domiciled in England at the period of his birth. The status of bastard was thus indelibly impressed on him; for although personal status may not in every case be unchangeable by migration to another territory, (as slavery, outlawry, legal infamy, and others founded on municipal regulation), yet all relations or distinctions resting on the *jus gentium* must necessarily be indelible. The circumstance, therefore, of the parents subsequently entering into wedlock, cannot have the effect to give the respondent the status of legitimacy.

2. But, independent of the preceding argument, the question must be decided by the law of the domicile of the parents at the date of the marriage. That domicile was England; and it is undoubted that the marriage could not, by the law of that country, have any effect to legitimize the respondent. In answer to this, it is quite irrelevant to say that the question has arisen in a Scottish Court, because, if this were admissible, there could be no question for decision: neither is it relevant that Scotland was the *locus contractus*, because there is no question as to the effect of that contract on the rights of the contracting parties, but as to a supposed right in the respondent; besides, the contract, although constituted by the forms of the law of Scotland, had reference to England for execution; and the parties were domiciled English subjects, the respondent's mother being a native of England, never in Scotland till the marriage took place, and never in that country thereafter; neither is it relevant to allege that Mr Ross was a native of Scotland, for although that may be an element of judgment in relation to a question of civil jurisdiction, and even in that question is, per se, of little weight, yet it cannot be of any moment in a question as to civil status; and the same observation applies to the circumstance of the possession of property in Scotland.

*Respondent.*—1. The general rule of the Scottish law is, that the children of persons lawfully married, whether born before or after marriage, are lawful children in all respects, includ-

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ing succession to lands. When the children have been born before the celebration of the marriage, they are said to be legitimated *per subsequens matrimonium*. The effect however is, that in all respects they are held to be legitimate. Fornication is punishable as a crime by the law of Scotland; but the effect of the subsequent marriage of the parties is, that the law casts a veil over all that has previously occurred between them. It holds their intentions to have been correct, the proof of which is, the declaration solemnly given, that they are married persons. The rule, that all the children of parties lawfully married are lawful children, forms a part of the common law of Scotland, not less fully established than the law of primogeniture, or the preference of males to females in succession to lands, and the equality of all lawful children in succession to moveables. How or when these legal rules or principles were introduced, may be matter of literary or antiquarian speculation, but the authority of the rules themselves in daily practice is liable to no dispute. It is known, however, that legitimation by subsequent marriage was introduced by the influence of the Christian religion. The first Christian emperor, Constantine, endeavoured by an imperial edict to allure parents from concubinage into marriage, by declaring that their children previously born should be held legitimate, if the parents should solemnize their marriage within a certain time. Edicts of this description were from time to time renewed by the emperors, Zeno, Anastasius, and Justinus. At length Justinian made the privilege perpetual. The rule was resisted for a time by the first feudal usages; but it ultimately prevailed in Scotland, and the Christian countries on the continent of Europe, as a part of the common law applicable to succession of every description.

But it is said that this rests on a fiction, viz. that the law feigns the father and mother to have been married antecedent to the conception and birth of the child; that in this case, the respondent having been born in England, (in which special solemnities are required to the celebration of marriage), the fiction cannot be entertained as possible. It is certain that the Roman imperial edicts contain no such fiction. It is true that the canonists state it, and Mr Erskine repeats it after them. The fiction has been suggested for the purpose of supporting a necessary exception to the general rule. The exception is, that children born in adultery cannot be legitimated. This just exception is said to be the result of the fiction, that to found legitimation by subsequent marriage, the marriage of the parties must have been legally possible at the date

July 18. 1830. of the conception of the children, which it could not be if the parents were under an absolute disability of marrying each other. Fictions are merely speculations suggested for the purpose of systematizing the common or statute law of a country, or they are pretexts to explain the necessary exceptions to general rules, in order to give effect to the intention of the Legislature when the words employed seem defective or too general. In relation to legitimation by subsequent marriage, the intention of the law is to induce men to desist from an unlawful habit of concubinage, and to convert it into the state of lawful matrimony. The reward held out is the legitimation of the children born in concubinage. It was very far from being meant by this law to give countenance to adulterous or incestuous intercourse. To avoid that effect, the canonists said the law feigned that the parents were married before the conception of the children; but as this was in certain cases legally impossible, legitimation per subsequens matrimonium could not occur in such cases. But even if the supposed fiction of antecedent marriage were held to be of any importance in the law of Scotland, it could not affect this case, because nothing existed to prevent the marriage of the respondent's father and mother antecedent to the respondent's birth. The law of England created no such impediment; and as to the form of expressing the matrimonial consent, that is unimportant, because, confessedly, the marriage is valid. If the English marriage ceremony were essential in this case, the want of it ought to have annulled the marriage itself. But as the marriage was a Scotch marriage, placing the parties under the Scottish institution, it is in vain to say, that by any fiction devised to enforce the intention of the Legislature, the ordinary result of the Scottish institution of marriage is in this case defeated.

2. The law of England cannot govern this case. The question relates to the effect of a Scottish marriage, and to the succession to a Scottish estate, and to a Scotsman. It must therefore be regulated by the law of Scotland, precisely on the same principle as the decision in the case of *Birtwhistle*,\* in relation to an English estate, was held to be governed by the law of England, although the marriage was made in Scotland. The appellant has no right to challenge the respondent's status except with reference to the question of the succession to the estate of Cromarty; and therefore, although in form it has been tried in a Court not competent

\* 5. Barn. & Cres. 438. This case was appealed, and after taking the opinions of all the Judges, the House of Lords proposed to them the Queries which will be found in the Appendix, No. VI.

to decide any question as to the succession to an heritable estate, July 16, 1880.  
yet that is truly the question at issue.

EARL OF ELDON.—My Lords, In this cause, which has been called the legitimation cause, it is not my intention to trouble your Lordships with more than a very few words. It is merely to state, that the points which have been raised in the discussion of this case have not escaped my attention, and that I do not give an opinion upon it without maturely considering the cases which have been previously decided. I have looked through all the judgments in the Consistorial Court, and the judgments of the learned Judges in the Court of Session, in order to correct the opinion I had formed upon those former cases, and which I had thought it right and consistent with my duty to express. I have listened with the utmost attention also to that which was stated at your Lordships' bar; and the result I have come to is, that it is not possible for me to find that the respondent was legitimate:—If I am right in that, the judgment must be reversed.

LORD CHANCELLOR.—My Lords, I will state to your Lordships in a word, what are the facts of this case:—A person of the name of Ross, who was a Scotchman by birth, came to England in early life, and resided in England, where he carried on business for fifty years, domiciled in London, where that business was carried on. He formed a connexion with a woman with whom he cohabited. By that woman he had, in 1811, a child. Five years afterwards, while he was still domiciled in London, he went to Scotland with the child and with the woman, for the purpose of being married. He did not go to Scotland for the purpose of remaining in Scotland, but went obviously *animo revertendi*. He was married in Scotland,—remained in that country a few weeks,—returned to London to his former domicile,—remained there during the continuance of his life, and died in London. The question is, Whether, by the law of Scotland, the child has become legitimate by the marriage of his parents under the circumstances I have stated?—Now, my Lords, there was a principle stated at the bar, upon which, however, I should be unwilling to decide this case, but which I will state to your Lordships:—That by the law of Scotland, where persons cohabit together unmarried, and a child is born, and they afterwards marry, with certain exceptions it is considered, that a contract of marriage was formed previous to the conception of the child. It was contended at the bar, as it had been contended in the Court below, that this rule does not apply to a case of the present description, for that no such contract could constitute a marriage in this country,—that nothing could constitute a marriage except the ceremony of marriage in *facie ecclesiæ*,—and that therefore, if such be the principle of legitimation *per subsequens matrimonium* relied upon, the individual cannot be legitimate in this case. My Lords, attending to



July 16. 1830. the whole of the argument, I consider the law of Scotland, in this respect, fit matter for consideration in other cases; but I do not wish to dispose of this case upon that principle. My Lords, this brings me, then, to the cases to which my noble and learned friend has alluded,—among these the case of *Shedden v. Patrick*, which, with one exception, was similar to the present. A native of Scotland went to America, where he was domiciled,—he lived there for more than twenty years,—he lived with a woman, by whom he had a child, and he afterwards married her in America. His father had a landed estate in Scotland, and the child born previously to the ceremony of marriage claimed as his heir. My Lords, when that case came before the Court in Scotland, it was considered by the learned Judges in that Court as necessary in the first instance to determine, as a distinct question, the question of legitimacy, and the question of status. My noble and learned friend has had the kindness to hand me a manuscript copy of the opinions of the Judges of that Court at the time when that case was decided. The fifteen Judges of the Court were unanimous in their judgment, with the exception of only one, who expresses his dissent, however, with great doubt and great diffidence, and they decided in that case distinctly and clearly against the legitimacy. Now, my Lords, referring to the judgment of some of those learned Judges, I should infer that they came to a conclusion upon the ground I am about to state—that, by the law of the country where the child was born, it was not only illegitimate, as is found, but that, by the law of that country, the illegitimacy was indelible, and therefore a subsequent marriage could not have the effect of rendering the child legitimate. A distinction might possibly be made between a marriage in Scotland and a marriage in America; but I do not enter into that distinction, for this reason, that if a marriage be celebrated according to the law and usage of the country in which it takes place, and according to that it is complete—it is complete everywhere; therefore I do not see, very distinctly, why marriage in Scotland should have a greater effect than would be attributable to a marriage in America, with respect to a child who had been previously born. It appears to me therefore unnecessary to go into that point. It is sufficient that the child be born in a country where the illegitimacy is indelible;—that, in any country whatever, would have the effect of rendering that child illegitimate. I collect that opinion to have been expressed in the case of *Shedden v. Patrick*. I collect this also from the judgment of Lord Redesdale, in the judgment in the case of the *Strathmore peerage*,\* where the noble and learned Lord commented upon the case of *Shedden v. Patrick*; and I believe that, at the time when *Shedden v. Patrick* was decided in this House, that noble and learned Lord was a member of it: however, these are the observations

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\* See Appendix, No. V.

July 16, 1830

the noble and learned Lord makes:—‘I do not enter into the question, whether, if this marriage had been celebrated in Scotland, it might have had the effect of legitimating the child, because I think it is not necessary;—I agree with the noble and learned Lord—I do not think it necessary;—but I must say that I cannot conceive how it could have that effect.’ The opinion of that noble and learned Lord is quite obvious from what I have stated, and from a subsequent passage, in which he considered the position of the child at the time of its birth, and the character stamped upon it at the time of its birth, as deciding the case. He afterwards says:—‘So I apprehend that this child was born illegitimate, according to the law of the country in which he was born—according to the condition of his mother, of whom he was born, and according to the state of his father, who was at the time a person unquestionably domiciled in England.’ Taking the whole of the judgment of the noble Lord together, I should conclude that he was of opinion, that if the child was illegitimate, at the time of his birth, and according to the law of the country where it was born, that character was stamped upon it indelibly—no subsequent marriage could render him legitimate. But it is not necessary to decide that question, for this reason—These parties were domiciled in England—the child was born in England—the marriage did not take place indeed in England, but the parties went to Scotland for the purpose expressly of being married; and having been married, they returned to England, to the place of their former domicile. I wish, agreeably to that which has been stated by my noble and learned friend, that this case should be decided with reference to this state of facts, without entering upon those other questions which the case may raise. I am of opinion, upon that ground, that the judgment of the Court below should be reversed.

EARL OF BARNES.—My Lords, The learned Lord’s conclusion appears to me to be perfectly correct, that it is your Lordships’ duty to reverse this judgment. Under the circumstances of this case I will just take this opportunity of saying, that I have given the greatest consideration to that which has been expressed in the judgments of your Lordships’ House, and that stated at the bar of the House by the Counsel, and to the decisions in Scotland with respect to matters of divorce; with reference to which I shall say no more at present than this, that I pledge myself to give the best assistance in my power to your Lordships, if I live till the next Session of Parliament, in endeavouring to settle what the law is upon that subject. Your Lordships know the Judges of the Consistorial Courts have differed with the Court of Session with respect to this very important point. It will be in the recollection of some of your Lordships, that, some few years ago, a person who was divorced in one of the Courts in Scotland, formed the opinion that he might marry again: he did marry again; he had been

July 16. 1880. originally married in England; he was convicted of bigamy, and the twelve Judges assembled to consider the effect of his conviction, which was a conviction on the Northern Circuit. The twelve Judges found, that the marriage having occurred in England, the divorce *e vinculo matrimonii* could not take place but by an English Act of Parliament.\* Whether that is right or wrong I will not stop to discuss; but I must say, that the subjects of England and Scotland should not be left in such a state of the law, subject to such a difference of opinion between the Judges in England and the Judges in Scotland. The mention of the case brings to my mind, that, holding the great seal at the time, it did appear to me to be a case in which some degree of mercy, on account of those decisions in Scotland, ought to be extended to that individual; and it was so extended; but I must take the liberty of saying, that the law of Scotland and the law of England ought not both to remain as they now are on such a question; and I will myself, if no other noble Lord undertakes it, introduce into your Lordships' House some measure for the purpose of disencumbering the subjects of both parts of the kingdom of certain contradictions, which are so extremely inconvenient; and I should hope your Lordships would feel the matter to be extremely worthy of your attention.

LORD WYNDHAM.—My Lords, With respect to the case to which my noble and learned friend refers, it was as much considered as any case which ever came before the learned Judges. It was argued by some of the most able men at the bar. The Judges were so clear in their opinion of the law, that they ordered the prisoner, who married a second wife during the life of his first, but from whom he had been divorced by a Scotch Court, to be transported. Mercy was afterwards shewn to this man by the Crown, I believe upon the ground, that as this was the first case in which it had been decided, that an English marriage was a good subsisting marriage, notwithstanding a Scotch divorce, he might not have been aware that he was acting illegally.

My Lords, in respect of the present case I will merely say, that I entirely concur in every thing that has fallen from my noble and learned friends. All Jurists agree, that the personal quality of a man must be decided by the law of the country in which he was born. I could refer your Lordships to authors of almost every country in Europe, particularly to Dutch writers, to prove this. This person is born in England a bastard, and by the law of England bastardy is indelible. He cannot become legitimated.

Boullentis, a French writer, in a commentary on the decision of one of the Courts of that country, says, in the case of De Conti, that although a native of a country, according to the laws of which a marriage subsequent to the birth of a child renders such child legitimate, is rendered legitimate by a marriage of his parents in England after

\* Case of Lolley, 7th Dec. 1812. Russell and Ryan's Crown Cases, 237.

his birth, that a person born a bastard in England is not legitimated by a subsequent marriage of his parents in France, on account of the indelible quality of bastardy under the law of England. July 16. 1830.

**LORD CHANCELLOR.**—My Lords, The very case my noble and learned friend has mentioned, the case of *De Conti*, decided in France in the year 1668, establishes, that where a child is born in a country where he would become legitimate by a subsequent marriage, he becomes so, although the marriage has taken place in a country in which a different law prevails, and where a subsequent marriage would not have the effect of rendering him legitimate. That child was born in France, where that law has effect, the parents afterwards came over to England—were married in England. There the French Court decided, that the effect of the marriage in England, although that law does not prevail in England, was to render the child legitimate in France, which is a complete confirmation of the principle I have alluded to.

The House of Lords ordered and adjudged, that, under the special circumstances of this case, the interlocutors complained of, in so far as they find the respondent George Ross entitled to the benefit of legitimation by the subsequent marriage of his parents, and in so far as they find expenses due by the appellant, be reversed.

*Appellant's Authorities.*—Huber *Prælect. de Conflictu Legum*, 2. 1. 3. § 6. 10. 12.; *Burgundias de Statutis*, p. 70. 18.; *Voet de Stat. p.* 137. 819.; *Hérsius de Societis*, &c. 1. 4. 8.; *Flofacher's Pfa. Jur. Civ. I.* p. 112. 14.; *Merrin's vol. x.* § 7. *Voorda de Statutis*, 3. 47. in *Bib. Faci.*; *Pothier, Coutumes d'Orléans*, 1. 1. 7.; *Cod. de Incolis*, l. 87. *D. ad Municipalem*, § 1.; *Müller, Domicilium*, § 17. 64. 76. *Forum Conti*, § 23.; *Boullenois, Traité de la Personnalité*, &c., vol. i. p. 62. *Christophe de Conti*, June 21. 1668, (*Guessiere, Journal des Audiences*, No. 3. p. 283.) *Bruce*, April 15. 1790, (see *Bell's Cases*, 519.) *Douglas*, Feb. 7. 1792, (2928.); and March 18. 1796, (*House of Lords*) *Ominaney*, March 18. 1796, (*House of Lords*) *Hog*, June 7. 1791, (8198); *Bell*, 491.; affirmed, May 7. 1792.; *Bampde v. Johnston*, (3. Vesey, jun. 189.) *Solmerville*, (5. Vesey, jun. 758.). *Strathern*, July 1. 1803, (No. 4. *Ap. Pfa. Comp.*) *Selwyn*, (2. Dow, 230.) *Pedie v. Grant*, June 14. 1822, (reversed July 5. 1825, ante, i. 717.) *Morecombe v. McLellan*, June 27. 1801., (F. C.) *Shedden v. Patrick*, July 1. 1803, (No. 6. *Ap. Foreign*): affirmed, March 2. 1808. *Strathmore Peerage*, March 1821, in *House of Lords*. See Appendix, No. V.

*Respondent's Authorities.*—*Pothier*, vol. iii. p. 320.; *Menechius*, p. 662. No. 16.; *Schurf's Cont.* 2. 56. No. 4.; *Cod. Nap. Mot.* vol. iii. p. 15, 16, and 61.; *Parsius*, p. 400. No. 26.; *Huber de Conflictu Legum*, § 9. 12. 13. 15.; *Dictionnaire des Arrêts*, vol. i. p. 777. and vol. ii. p. 546.; 2. *Craig*, 13. 16.; 1. *Ersk.* 6. 52.; 1. *Bank.* 5. 54.; *Hérsius de Collisione Legum*, § 4. 10. 16.

**RICHARDSON and CONNELL—A. MUNDELL,**—Solicitors.



No. 36. WILLIAM FORBES, and OTHERS, Appellants.—*Campbell—Wilson.*

JOHN SHAW, and OTHERS, Respondents.—*Spankie—Milne.*

*Parish—Church—Relief.*—A committee of heritors, appointed by the Court of Session to build a church and assess the heritors, having been obliged to raise money on their bills to meet deficiencies by the failure of heritors to pay;—Held, (affirming the judgment of the Court of Session), that the Committee were entitled to relief against an heritor pro rata, although he had paid his full share of the assessment.

July 22. 1830.

1st Division.  
Lord Eldin.

ON the 8th of March 1805, the Presbytery of Linlithgow ordained the church of Falkirk to be immediately rebuilt, agreeably to certain plans and specifications. Of this decree, the late Mr Forbes of Callender brought a suspension, in which, after a great deal of litigation, the Court of Session found that the heritors were bound to build a church fitted to contain 1500 sitters, and appointed them 'to hold a meeting within the parish-church to choose a collector, advertise for contractors, and take the other steps necessary for carrying the work into execution.' A meeting was accordingly held, which was attended by an agent on behalf of Mr Forbes, and a collector appointed. On this occasion Mr Forbes protested, that no contract should be entered into for executing the work till the money was levied and lodged in the Royal Bank of Scotland. The Court thereafter appointed a committee 'forthwith to advertise for contractors, and take the other steps necessary for carrying the work into execution;' and, failing their doing so, authorized the Presbytery of Linlithgow to enter into such contract. Various meetings of the heritors then took place—the result of which was, that a new application was made to the Court, who authorized Shaw and others, (the respondents), as a committee, to enter into a contract for building the church, 'with power to them to assess the heritors of the parish of Falkirk in the sums contained in the contract for building the church; and in general, to take such steps as are necessary for carrying the work into execution.' The respondents thereupon entered into a contract with builders to erect the church for the sum of L. 3593, which they bound themselves to pay by instalments, according to the progress of the work; and the builders undertook to have it completed by the 1st of August 1811. At the same time the respondents assessed the heritors in the sum of

L. 1000, and authorized the collector immediately to recover payment of it. This having been resisted by certain of the heritors, the respondents again applied to the Court, who empowered them to assess the heritors in the sums necessary for building the church. In consequence of this, they declared the first assessment to be L. 2000; but, before it could be levied, the first instalment had become payable, and the respondents were obliged, on the 24th of May 1810, to grant their bill for its amount, being L. 500. In the month of June thereafter Mr Forbes paid his share of the assessment, being L. 594. 17s. A farther assessment of L. 1500 was authorized in November, of which Mr Forbes punctually paid his share, but various other heritors and feuars failed to pay their proportion. Certain extra work having been authorized, the expense of the work was increased about L. 1200, and, in October 1811, a farther assessment was ordered, of which Mr Forbes did not pay his share for six months afterwards, but he alleged that he had done so immediately on the amount being demanded.

In the meanwhile a considerable defalcation arose from heritors and feuars resisting payment in actions at law, becoming insolvent, &c.; and in August of the above year the respondents granted their bill to the builders for L. 793, and another on the 10th of January 1812 for L. 453. These bills were between that period and 1825 repeatedly renewed,—partial payments being occasionally made; and ultimately the balance amounted to L. 146, part of which was composed of stamps and discount. It was alleged by the respondents, that in states rendered to Mr Forbes he was made aware that the money had been raised in this manner; that he had paid his share of the discount included in these states; and that the subject of the arrears and the existence of the bills were repeatedly brought before meetings of the heritors, which were attended by Mr Forbes, or by persons on his behalf. At a meeting held on the 29th of July 1825, a majority resolved that the heritors should be assessed in a sum sufficient to relieve the respondents, and of which the share corresponding to the valued rent of Mr Forbes's estate was L. 119. 4s. 4d.

In the meanwhile Mr Forbes had died, having appointed trustees, and being succeeded by his son, (then a minor), against whom the respondents raised the present action, concluding for payment of the above sum. This was resisted on the ground that Mr Forbes had paid his full share of the expense of building the church, and that he could not be liable for others, nor for the discount of bills. The Lord Ordinary decerned in terms of the libel

July 22. 1830.

July 22, 1830. with expenses, and the Court on the 5th of June 1827 adhered.\*

Mr Forbes and the trustees appealed.

*Appellants.*—Heritors are liable for the expense of building a church only according to the valuation of their lands within the parish, and no heritor can be assessed for more than his rateable proportion. But it is admitted that Mr Forbes duly paid his proportion. He is not, and cannot be made liable to guarantee the sums allocated among the other heritors. The assessment could by ordinary diligence have been recovered from them, because their heritable estates were pledged for the amount. Besides, the respondents did not act with due discretion and judgment. Mr Forbes at the outset protested against any expense being incurred until funds were recovered and lodged in the bank; whereas the respondents voluntarily incurred a personal responsibility for payment of sums before it was possible to levy the assessments. If in this manner they have got themselves involved in difficulties, they must extricate themselves, and cannot have recourse on Mr Forbes or his representatives.

*Respondents.*—The respondents were appointed, by the Court of Session, a committee on behalf of the whole heritors, to carry into effect a legal obligation imposed upon them—the building of the church. They accordingly, as trustees for and on behalf of the heritors, bound themselves personally to the builders. In doing so they acted gratuitously, and consequently the heritors were bound to provide them with funds, or, if they made any advances, to relieve them. With this view the heritors, including Mr Forbes, appointed a collector to levy the assessments; the warrants of which the respondents were authorized to issue. It was not by the fault of the respondents that the full sums for which those warrants were granted were not realized; and as they were compelled to grant their bills, and borrow money to pay for the expense of the church, which was a debt truly due by the heritors, they are entitled to be relieved *primo loco*, reserving to the heritors their relief *inter se*.

LORD CHANCELLOR.—This can only be sustained as an assessment for the purpose of rebuilding the church. The power of making the

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\* 5. Shaw and Dunlop, 761.

assessment was vested by the Court of Session in the committee; and, July 22. 1830, as long as that authority existed in the committee, it appears to me, according to my present impression, that the heritors could not exercise that authority—they could have no authority concurrently with the committee. That is a point of some consequence, and as it is a point that was not taken in the Court below, I should like to have an opportunity of considering it.

As to the other question, Whether the committee can be considered justly chargeable with negligence? it appears to me that they were bound to pay the money by the contract; and, being so bound, they were under the necessity of borrowing it, or had a right to borrow it. An incident of that borrowing was the payment of interest, and there is no reason to suppose they did not exercise diligence in recovering the arrears. The rest of the heritors had the same right of enforcing that money; the collector was their servant.

With regard to the first question which I have stated, Whether the heritors or the existing committee had the right to make the rate?—as that point was not made in the Court below, I should like to look into the Scotch authorities upon the subject; therefore let the case stand over.

**LORD CHANCELLOR.**—My Lords, There is a case of Forbes against Shaw, which was argued some time since at your Lordships' bar, and the question stood over for the purpose of considering a point of form. It was a case with respect to a church assessment. In the interlocutor pronounced by the Court of Session, the committee of heritors were empowered to make a rate for the purpose of defraying the expense of rebuilding the church. The committee, in pursuance of the power with which they were so entrusted, did make a rate; and the question has been raised, Whether or not there had been any negligence on the part of the committee in collecting the assessment? The collector who was appointed for that purpose was the officer of the heritors, and he was an officer also appointed by the committee. Your Lordships were of opinion, upon the merits, that there was no negligence on the part of the committee, and one of your Lordships expressed an opinion to that effect at the time. I stated to your Lordships what my impressions with respect to that part of the case was, and the House concurred in that opinion. In point of fact, the collector, who was the officer of the heritors, experienced many difficulties in collecting the assessment. In consequence of these difficulties, none of which are attributable to the collector, it became necessary to make a new assessment for the purpose of supplying the deficiency. That, in whatever form it was done, was an assessment for the purpose of rebuilding the church; but it appears that this new assessment was not



July 22. 1830. made by the committee, but it was made by the heritors. It was argued at the bar, that the heritors had no power of making the assessment; but that power was given to the committee by an interlocutor of the Court of Session. Undoubtedly the committee were empowered to make an assessment for the purpose of building the church, and if they had made one which could have been collected and was operative, it is clear the heritors could not have made another; but as the whole amount could not be collected under the former assessments—as a large sum remained uncollected, it was necessary to make a second assessment—and as there are no negative words in the interlocutor preventing that—and as the heritors have by the law of Scotland a power to make assessments for purposes similar to the present, I should submit to your Lordships, that the second assessment was a regular and valid assessment, not interfering with any powers in the committee; because the committee had made the only assessment they intended to make—nothing further being capable of being done by them. I apprehend, under those circumstances, it was competent for the heritors, according to the general law of Scotland, to meet and make a second assessment, that the money which was requisite to complete the contract might be collected. I submit therefore to your Lordships, that the point reserved for further consideration will not avail the appellants. It does not appear to have been argued in the Court below, but I am to take it for granted, that the Court below considered that the heritors had the power of making the assessment. As in this case there was no doubt about the merits—as the point of form never was argued in the Court below, and there being nothing in that point of form—the opinion of my noble and learned friend concurs with my own, that there ought, under such circumstances, to be costs to the amount of L.60.

The House of Lords accordingly ‘ordered and adjudged, that  
‘the interlocutors complained of be affirmed, with L.60 costs.’

J. CHALMER—HENRY HYNDMAN,—Solicitors.

MRS INNES or RUSSELL, (Executrix of JOHN INNES, Esq.,) No. 37.  
Appellant.—*Brougham*\*—*Spankie*.

EXECUTORS of ALEXANDER DUKE OF GORDON, Respondents.  
—*Lushington*—*Robertson*.

*Bona or Mala Fides—Entail.*—Circumstances under which (affirming the judgment of the Court of Session) it was found, 1. That a party possessing under a long lease, in violation of an entail, was not entitled to claim meliorations from a succeeding heir of entail; and, 2. That he was liable in violent profits, from the date of the judgment of the Court of Session, reducing the lease.

*Process—Declinature.*—Where the Court of Session rejected the vote of a Judge who had not been present at a hearing in presence, but considered the subsequent written pleadings; and would not require the opinion and vote of a Judge who declined, in consequence of having been leading counsel for the pursuer, the House of Lords affirmed the judgment.

THE estate of Durris, situated on the banks of the river Nov. 10, 1830.  
Dee, in the County of Aberdeen, extends to upwards of 32,000  
acres, and comprehends the whole parish of Durris, and part 2d DIVISION.  
of another parish. It was entailed, in 1669 and 1675, by Lord Mackenzie.  
Sir Alexander Fraser. On the 11th of April, 1780, Henry  
Earl of Peterborough made up titles, by special service, as heir  
of entail, and was infeft. He entered into a transaction, in  
1793, with the late Francis Russell of Westfield, advocate, (the  
brother-in-law of John Innes, W. S., and the brother-german of  
the present appellant,) by which his Lordship sold to Mr Russell  
the estate of Durris. To ascertain judicially his power to do so,  
Mr Russell presented a bill of suspension, as of a threatened  
charge for the price, in which Mr Innes acted as his agent.  
The bill having been passed, the Lord Ordinary, on the 5th of  
June, 1793, suspended the letters simpliciter—thereby finding  
that his Lordship had no power to sell the estate. By consent  
of parties, this interlocutor was recalled, and informations  
ordered to the Court, who adhered to the judgment of the Lord  
Ordinary. An appeal was then presented by the Earl to the  
House of Lords; but, while it remained undisposed of, the  
parties entered into a new arrangement, the leading object of  
which was, to let the estate, for a long period of years, to Mr  
Russell, with powers almost equivalent to those of a proprietor,

\* The Cases are reported of the dates when the judgments were pronounced, and previous to that in the present, and some of the following Cases, Mr Brougham was appointed Lord Chancellor.

Nov. 10, 1830. subject to a stipulation in a relative deed of agreement, that if the judgment should be reversed, and his Lordship found entitled to dispose of the estate, the sale should be completed. With reference to this arrangement, the subjoined memorial was, on the 29th of July, 1794, laid before Mr Mathew Ross, Dean of the Faculty of Advocates, to which he gave the annexed answers.\*

\* ' A. B. is heir of entail of an estate, the deed of entail of which contains this clause: " That it shall be noways lawful to my said son, nor his heirs of tailzie " and provision above written, mentioned and contained in the said tailzie and substitution, in order as is above prescribed, nor their foresaids, to alter, impugn, nor innovate this present tailzie, nor to dispone, wadset, sell, or away put the lands, baronies, and others foresaid, nor to contract debt thereupon exceeding the sum of £.3000 Sterling, nor do any other fact or deed, civil or criminal, whereby the said lands, or any part thereof, may be anyways comprised, adjudged, evicted, or forfeited from them, in prejudice of the next person succeeding," &c.; " and if they shall fail," &c. Then follow the usual irritant clauses.

' The deed of entail contains no other clause against alienating or contracting debts; and, in particular, contains no prohibition or limitation whatever respecting the granting of leases for any endurance.

' The memorialist, A. B, is desirous of setting a long lease of his estate, and of giving ample allowance for enclosing, planting, building stone walls and farm-houses, to be advanced by the tenant, but for which he is to be entitled to repayment before his removal.

' 1. For what duration might A. B. grant a lease of his whole entailed estate, with security to grantor and receiver?

' 2. Would there be any danger or imprudence in making the first period of the lease the life of the present heir of entail, and the longer period to commence at such heir's decease?

' 3. Supposing it to be prudent not to diminish the present rental, and yet, the fact being, that, owing to every species of folly and bad management on the part of the memorialist's factors and agents, the present rent is considerably reduced from what it was some years ago, how shall a mode of ascertaining the present rent, probative and satisfying at a future day of dispute, be devised?

' 4. Under the circumstances of such a case, will the most extensive power of meliorating, in building houses, stone fences, planting, and draining, be sustained to the tenant, before he can be removed from possession of the lands, provided such are actually, and bona fide, and beneficially laid out for the estate?

#### ANSWERS.

' To 1st Query.—The entail containing no prohibition or limitation as to the granting of leases, I incline to think, that the heir of entail is at liberty to grant leases even of a very long endurance, and to which I can fix no precise limit. But I think it most advisable and safest for both parties not to exceed three nineteen years, being a term not unusual when nothing is in view but the accommodation of the tenant, or four nineteen years, for which there is an express precedent in the case of *Orme ag. Leslie*, in 1779.

' To 2d Query.—I see no reason or occasion for making any period in the lease at the death of the grantor; on the contrary, it may rather furnish a handle for some

A contract of lease, and a separate deed of agreement, bearing date Nov. 10, 1830, between the Earl and Mr Russell, were thereupon executed, in

challenge of the subsequent part of the lease; and therefore, I think the term should run without paying any regard to the time of the grantor's death.

' To 3d Query.—The heir of entail appears to be at liberty to grant leases at a rent even lower than the former or present rent, provided the transaction is not gratuitous, and he may grant such leases either in consideration of a grassum, or without a grassum. Such being my opinion on the point of right, and the plan in view, as I understand, being to let a long lease for a considerable grassum, which implies that the stipulated rent is to be lower than a full adequate rent, the preserving of probative and satisfying evidence of the present rent, does not seem to be very material; and the more especially, as it is stated in the query, that the rent has been much reduced of late by folly and bad management, so that it can hardly be any rule.

' However, as it may afford some additional security against challenge, and it is therefore desirable that the rent by the new lease should not be below the present rent, it may not be amiss to fix the rent at an average of what the lands have yielded for some years past; if the tenant paying such rent, can also afford to give a sufficient grassum.

' And for ascertaining and preserving evidence of the fact, a rental of the estate for these years may be made up and signed by the proprietor and his factor, and the obligation granted by the lessee for the grassum, may proceed upon a narrative that he had agreed to take the lands at a rent equal to an average of the rents for so many years past, as stated in such a rental, (specially referring to it), and to pay besides such a sum in name of grassum. This obligation, retired with a discharge upon it, and the authenticated rental remaining in the hands of the lessee, will, it is thought, be sufficient evidence of the fact at an after period.

' To 4th Query.—I apprehend that the expense of improvement to an unlimited extent, cannot be made a charge against the succeeding heirs of entail, in the manner proposed in the query; and therefore, if the tenant means to lay out largely upon improvements, and to have a recompense from the proprietor for the expense, he must secure such recompense to himself in a different way; and it may be done either by diminution of the rent, or by a prolongation of the term. Another method might perhaps be taken under authority of the Act of 10 Geo. III. ch. 51, which empowers the proprietor of an entailed estate to charge the estate with debt, for the expense of improvements, to the extent of four years' rent; but when there is a long tack granted at a low rent, and a grassum taken, the succeeding heirs of entail may have more reason to complain of this method than of any other, and therefore it does not seem advisable.

' If the tenant takes his recompense for expense of improvements, by lengthening the term, the lease should be granted simply for the longest endurance that is intended, with a condition that there shall be a breach at an earlier period, which the proprietor may take the benefit of, upon paying the expense laid out by the tenant on improvements, as ascertained in some method to be prescribed by the lease. For example, if the agreed term, according to which the grassum is settled, shall be three nineteen years, and it is farther agreed that another nineteen years, or another nineteen years and the lifetime of the tenant in possession at the end of them, shall be given as a consideration for the expense of improvements, then the lease should be granted simply for four nineteen years, or four nineteen years and a lifetime, with a breach to the proprietor, at the end of three nineteen years, if he chooses to pay the expense of improvements.

Nov. 10, 1830. the month of August, by which his Lordship let, for the period of four times nineteen years, and thereafter for the lifetime of the tenant in possession at the end of that time, the whole estate, including the mansion-house, the mines and minerals; with power to cut wood, on condition of planting one acre for every three acres cut down; to exercise the exclusive right of shooting, subject to a personal privilege in favour of his Lordship; to nominate the parish clergyman; to pull down the mansion-house and rebuild it, subject to claims against the heir of entail; and, in general, to exercise substantially all the rights of a proprietor. On the other hand, he bound himself to pay, till Whitsunday 1822, a rent of L.1000 per annum; L.1100 for the subsequent nineteen years; L.1200 for the next nineteen years; and L.1300 posterior to the expiration thereof, and during the lifetime of the tenant in possession. No obligation was imposed on him to lay out any money on meliorations; but he was empowered to do so if he thought fit; and it was stipulated, that, for the meliorations, he should be allowed a just and reasonable sum at the expiry of the lease, and before removal. It was alleged by the appellant, that at this time the estate was in the most wretched condition; and it appeared, from a judicial rental, that the annual rent was L.1078.

On the 6th of September, 1794, these deeds were laid before

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'It being intended that there should be a considerable sum laid out by the tenant in improvements, it may be proper that there should be an obligation to that purpose in the lease, obliging him to lay out in improvements, of a specified nature, not less than a specified sum, within a limited time; for example, within the first nineteen years. This will tend to strengthen the onerousness of the lease, with respect especially to the heirs of entail. And if the recompense is taken by lengthening the term, in manner above mentioned, it may also be proper to limit the claim of improvements at the breach to a certain sum, which it shall not exceed.

'If there are subsisting leases of some of the farms of the estate, and the present proprietor should die before these leases expire, it may be doubted if a general lease of the estate to be now granted, comprehending those farms, will be effectual as to them; and I rather think it would not be binding upon succeeding heirs of entail, with respect to such farms.

'If, therefore, there are parts of the estate in this situation, I apprehend one of two things ought to be done. Either renunciations of these leases should be procured, so as the new tenant may obtain actual possession of the whole estate, under the general lease, or, if this cannot be effected, there should be two leases granted, —one of those parts of the estate which are not under lease, or, at least, not under leases of any considerable endurance; and another of those parts of the estate which are under leases, of which there is more than one year to run, or so many years that the new tenant does not choose to take his hazard of the present proprietor surviving the termination thereof.'

Mr Solicitor-General Blair, accompanied by the subjoined memorial, to which he made the annexed answer.\* Nov. 10, 1830.

\* 'It was agreed upon betwixt these parties, that the Earl of Peterborough should, in consideration of a large sum of money instantly paid to him by Mr Russell, grant a tack to him and his heirs, assignees and sub-tenants, of the estate of Durris in Kincardineshire, for four nineteen years, and the liferent of the person in possession of the tack at the expiry of the fourth nineteen years, Mr Russell and his heirs to pay no rent beyond what might be equivalent to the burdens affecting the estate during the lifetime of the Earl, and thereafter to pay L.1000 per annum, subject to payment of the burdens. The Earl likewise agreed to make over to Mr Russell the whole furniture in the house of Durris, and stocking, &c., about the place, with the arrears of rent, and rent due and payable at Mr Russell's entry, he relieving the Earl of certain accounts due by him. It was also agreed upon, that if the Earl should afterwards be found to have a power of selling his estate of Durris, that he should be bound to sell, and Mr Russell to purchase at a certain price, the money now paid being imputed in part of that price. In the last place, it was bargained that the Dowager Lady Peterborough should convey to Mr Russell a liferent annuity for L.300, payable to her out of this estate of Durris.

'For carrying this plan into execution, the Earl of Peterborough applied to Mr James Chalmer of London to cause the necessary deeds to be made out. In consequence of which, the following deeds were executed betwixt the parties:—

- '1. A tack for the space, and on the conditions specified.
- '2. A disposition and assignation of the arrears of rents, household furniture, &c.
- '3. A contract betwixt the Earl of Peterborough and Mr Russell, whereby the nature and import of the transaction is fully stated, and special reference is made to Robert Blair, Esq., Solicitor-General for Scotland, to say if the deeds executed are sufficient, or what alterations or further deeds are necessary for giving effect to the understanding of the parties; and both parties bind themselves to execute any new deeds that may be by him thought necessary.
- '4. Conveyance by Lady Dowager Peterborough to Mr Russell.
- '5. Commission by the Earl of Peterborough to Mr Russell, for the purpose of managing the estate.
- '6. Mutual missives, declaring that the rent payable during the Earl of Peterborough's life, was meant to meet and pay public burdens and the interest of two heritable debts, and that if this rent fell short of doing so, Mr Russell was to have no claim, nor his Lordship for any surplus; and lastly, obliging Mr Russell to relieve the Earl of certain accounts due by him.

'These several deeds are laid before Mr Solicitor-General; and it is requested he will, for the safety and satisfaction of parties, examine the same, and give his opinion how far they are properly drawn for carrying the agreement and understanding of parties into execution, or what alteration ought to be made on them.'

ANSWER.

'I have perused the lease and other writings herein referred to, and I am of opinion that the same are accurately and properly framed for carrying into execution what I understand to have been the meaning of the parties; and it does not appear to me that any addition or alteration is necessary, or would answer any good purpose. There may be a doubt whether the obligations prestable by the landlord at the expiration of the lease, such as the repaying the expense of buildings and meliorations, &c. will be effectual against a succeeding heir of entail. But this is a question which arises not from any imperfection of the deeds which have been executed, but from Lord Peterborough's limited powers over the estate; and I do not know of any way in which it could be obviated, or how the lessee could be put upon a better footing than he now stands with respect to that matter.'

Nov. 10, 1830. The appeal was thereafter withdrawn; and, on the 21st of October, Mr Russell executed an assignation of the lease in favour of Mr Innes, who entered to possession. At this time, the next heir-substitute was Lady Mordaunt, whom failing, Lady Frances Bulkely, whom failing, Alexander Duke of Gordon, and on his failure, his eldest son, the Marquis of Huntley. In the month of July, 1797, Mr Innes entered into a transaction with the Marquis, by which, for certain valuable considerations, the Marquis became bound, in the event of his succeeding to the estate, to confirm all the rights which had been conferred on the tenant by the Earl of Peterborough. This transaction with the Marquis having become known to his father, he repaid the sums, and obtained a cancellation of the deed.

The lease was not recorded till December, 1806, nor the relative agreement till February, 1815. The Earl of Peterborough died in June, 1814, whereupon he was succeeded by the Baroness Mordaunt. In the course of the same year, she raised an action against Mr Innes, concluding for reduction of the lease and deed of agreement, for decree of removal as at Whitsunday, 1815, and for violent profits. A great deal of litigation took place in regard to the power of the Earl of Peterborough to grant the deeds challenged; but, on the 24th of June, 1817, the Court found, that they were in violation of the entail, and therefore reducible; but appointed memorials in regard to a plea, that although the leases could not be sustained in toto, yet they might be supported for a shorter period. To the above judgment their Lordships adhered, on the 9th of March, 1819, and also found, that the lease could not be sustained for any period; and therefore decerned in the reduction, and also in the removing, and remitted to the Lord Ordinary to hear parties as to the term of removal and the question of meliorations. The Baroness Mordaunt having died in June thereafter, and Lady Bulkely being also dead, Alexander Duke of Gordon was served heir of entail, sisted as pursuer, and the judgments were affirmed by the House of Lords on the 5th of July, 1822, without hearing the counsel for the Duke.\*

The case having then returned to the Court of Session, and been remitted to the Lord Ordinary to proceed in the question of removal and meliorations, the Duke moved his Lordship to ordain Mr Innes to remove at Whitsunday then following (1823.) This was resisted by Mr Innes, on the ground, that he was entitled to retain possession till the value of the meliora-

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\* See 1 Shaw's Ap. Ca. 169.

tions was ascertained and paid; and, in consequence, the Lord Nov. 10, 1830. Ordinary made a remit to an inspector to ascertain the amount and extent of the meliorations, and superseded the motion for removal. The inspector reported, that so far as he could, under existing circumstances, estimate their value, they amounted to about L.47,000.

In the meanwhile, Mr Innes had raised a summons against the Duke of Gordon, and also against the representatives of the Earl of Peterborough founding on the lease, averring that he had made extensive meliorations, and particularly, ‘ That he  
‘ built a mansion-house, with kitchen, outhouses, and a complete square of offices : That he enclosed a garden, and planted  
‘ it with fruit-trees, and planted ornamental woods round the  
‘ place of Durris, containing many thousands of thriving hard-wood trees : That he made roads and drains through the pleasure-grounds, and built above one hundred dwellinghouses and  
‘ offices for the subtenants on the said estate : That the pursuer  
‘ also trenched and limed, and brought into perfect cultivation,  
‘ 368 acres of new land, which was never before under the plough,  
‘ besides bringing the land which was under cultivation, but  
‘ which was described in the said judicial rental as in wretched  
‘ order, into good and husbandman-like condition : That the pursuer built 60,350 ells of stone dykes, necessary for farming the  
‘ said estate, and erected a bulwark to protect the best farm on  
‘ the estate from the river Dee, at a very great expense : That  
‘ he made roads at his own private expense through the said  
‘ estate, and connecting the same with market-towns to a great  
‘ extent, and enclosed, planted, and reared above 900 acres of  
‘ wood, which is now of considerable age and great value : That  
‘ the pursuer, trusting to the validity of the deeds before narrated, sold his large and valuable paternal property, and expended the whole price thereof in improving the said estate,  
‘ and likewise contracted large debts for the same purpose : That  
‘ the rental of the said estate of Durris has been increased by the  
‘ outlay and exertions of the pursuer from L.958 of yearly rent  
‘ to L.5500, which it will now yield : That the said Mary Baroness Mordaunt, and the said Alexander Duke of Gordon,  
‘ were in the perfect knowledge of the terms and conditions of  
‘ the lease, and also of the pursuer’s great outlay on the said  
‘ estate, and allowed him to proceed with the same for the space  
‘ of twenty years, without intimating any intention of challenging the said lease, till the said Earl of Peterborough’s death.’  
And therefore concluding that the Duke of Gordon ought to be ordained ‘ to make payment to the pursuer of the sum of L.90,000,  
‘ as the sum expended by the pursuer upon improving the said



Nov. 10, 1830. 'estate, with the said defender's perfect knowledge and acquiescence, and of which he and his heirs of entail will immediately reap the benefit, by the aforesaid rise in the rental of the said estate;' and that the representatives of the Earl of Peterborough should be decerned, in virtue of the clause of warrandice, 'to make payment to the pursuer of the sum of L.120,000, in name of damages and reparation, for the loss of the advantages of the foresaid lease, and assignation thereof in favour of the pursuer, and of the further sum of L.10,000, or such other sum, less or more, as shall be found to be the expenses justly incurred by the pursuer in defending said action of reduction, and interest thereof from the end of each year till paid: Also, of the said sum of L.90,000 of meliorations, or such part thereof as the said heir of entail shall not be found liable for.'

In defence against this action the Duke of Gordon pleaded that he did not represent the grantor of the lease;—that he was a mere heir of entail;—and that the meliorations had not been made effectual against the estate in terms of the statute 10th Geo. III. c. 51.

Thereafter the Lord Ordinary decerned in the removing as at Whitsunday 1824, to which judgment the Court adhered on the 18th of May of that year—the term of removal having been postponed by the consent of the Duke till Martinmas, when Mr Innes gave up the possession.

A demand was then made by the Duke for the violent profits from and after Whitsunday 1815, being the first term after citation. This was opposed by Mr Innes, who contended that he could not be held to be a mala fide possessor till the date of the judgment of the House of Lords on the 5th July, 1822. The Lord Ordinary took a view different from both parties, holding that the decision of the House of Lords, on the 12th of July, 1819, in the case of the Queensberry entail, was a certioration to Mr Innes of the invalidity of his title, and therefore found him liable in violent profits from that date. Both parties having reclaimed, the Court found 'That the bona fides of the defender, in retaining possession of the estate of Durris on the lease of the same acquired by him, ought to be held to have come to an end not sooner, but on the 9th day of March, 1819, being the date of the decree of reduction and removing pronounced by the Court. Therefore, that the defender is liable to account for violent profits from and after the first term subsequent to that date; in so far, altered the interlocutor of the Lord Ordinary,' and remitted to him to proceed accordingly.\*

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\* See 6 Shaw and Dun., p. 996, where the opinions of the Judges are given.

In the meanwhile, the Lord Ordinary reported the action relative to the meliorations to the Court, and at the same time issued the subjoined Note : ‘ The Lord Ordinary thinks, that, considering the nature of the question, and the circumstances of procedure in this case, the desire of the pursuer, that the case should be taken to report, is reasonable. The Lord Ordinary wishes only to observe, that in addition to the argument submitted to him, it may perhaps be considered, whether an heir of entail may or may not be liable to a bona fide melioration, if not to a greater extent, yet at least in as far as it can be proven that he himself individually is rendered locupletior, by receiving larger rents or profits from the estate during his own life, in consequence of the meliorations, i. e. liable to pay over a portion of the rents to the party whose expenditure produced that portion. The Lord Ordinary, of course, gives no opinion whatever on this or any point.’

The Court, on advising Cases ‘ with the important and interesting circumstances of the case,’ appointed a hearing in presence of both Divisions. The hearing accordingly took place, in which Mr Cranstoun (afterwards Lord Corehouse) was leading counsel for Mr Innes, and at this time Lords Hermand and Robertson were upon the bench. On the 18th of June, 1825, the Second Division (before whom the cause depended) ordered Memorials to be laid before the whole Judges. These pleadings were prepared, and put into the boxes ; but Mr Innes having thereafter discovered the memorials submitted to Mr Ross and Mr Blair, and their opinions, (which had gone amissing,) applied for leave to communicate them to the Judges, which was allowed. In the interval Lord Hermand had resigned, and was succeeded by Mr Cranstoun as Lord Corehouse ; and Lord Robertson had also resigned, and Mr Irvine was appointed in his place as Lord Newton. The opinions of the Judges having been required both with reference to the memorials and the new productions, and the Judicature Act having come into operation, (by which votes were conferred upon the consulted Judges,) Mr Innes insisted that as Lord Hermand had retired before the productions had been laid before the Court, his opinion and vote should not be admitted ; that although Lord Newton had not been on the bench at the time of the hearing in presence, yet, as the memorials and productions had been laid before him, his opinion and vote ought to be received ; and that Lord Corehouse (who had declined to give an opinion in respect he had acted as counsel for Mr Innes) ought to be required to give his opinion. On the other hand,

Nov. 10, 1830. the Duke of Gordon maintained that none of these opinions should be received.\*

The Court having declined to receive the opinions of these

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\* With reference to the above point, the following notes of what took place in the Second Division were laid before the House of Lords :

'*Lord Justice-Clerk.*—I have now to intimate what has passed in consequence of the situation in which we found ourselves when this case was last before us. We agreed to take the opinion of our brethren ;—at the same time, if any thing was considered of importance, we would have asked the assistance of the Counsel at our consultation. This was not considered necessary, and I have now to state the result. First, The peculiarity of the situation of Lord Hermand was brought under their Lordships' notice. His Lordship had not an opportunity of giving any opinion upon the point, which afterwards was brought out by the discovery of the memorial and opinion of Mr Ross ;—also the situation of Lord Newton, who was not a Judge on the Bench at the time of the hearing, but he had read the memorials and given his opinion. The opinion of the whole Judges was, that the opinion of Lord Hermand should be set aside altogether, as also the opinion of Lord Newton, because he had not an opportunity to hear the cause. This being the state of the matter, if there is any thing to be stated from the bar, it should be stated now.

'*Jeffrey* here expressed his regret that the Court had not considered it proper to have Counsel present at the consultation of the Judges. After looking into all the series of regulations as to the duties of consulted Judges, he had not been able to discover any grounds for doubting that Lord Newton and Lord Corehouse were entitled to give their opinion on this matter. The hearing took place before the act passed directing the manner in which the opinion of the consulted Judges shall be taken. That is now done by queries, in which there is no argument ; and the opinion of the Judges may be given upon these abstract queries, without having seen or heard any argument. The point may be stated in a short query, and there is nothing in the statute containing an injunction that a hearing shall take place before the consulted Judges give their opinion.

'*Lord Justice-Clerk.*—Although there may be a great deal in what Mr Jeffrey states in the abstract, we cannot give way to it in this particular case. When we required the opinion of the Judges in July, 1825, it was the opinion of the Judges who then composed the Court. When we made the remit to the other Judges, we had reference to those Judges who were then in Court. A contrary doctrine would lead to this, that if we were not to consider ourselves confined to the opinions of the Judges at the time the remit was made, we might have the opinions of 25 or 30 Judges, in consequence of changes on the bench, before the case was finally advised. Those that were unable to give their opinion must just be deducted from the number. We thought Lord Hermand's opinion not perfect, because he had not seen the memorial which was afterwards produced. As to Lord Corehouse, the Court were quite clear, that under the delicacy which his Lordship felt from his having been leading Counsel for one of the parties, he was not in a situation to give the same consideration to the case as the other Judges ; and at all events, we were all of opinion that we could not ask his Lordship to do in this case what he had declined to do in other cases.

'The result, then, of the whole, is this,—there is an opinion in favour of Mr Innes's claims from four Judges who have been consulted, and also two of your Lordships' number ; while, on the other side, there are five of the consulted Judges, and two of your Lordships. Therefore, the judgment of the Court must be, that Mr Innes's claim is refused by a majority of one.—Sustain defences—assist the defender.'

Judges, the result was that there were seven votes in favour of Nov. 10, 1830. the Duke of Gordon and six in favour of Mr Innes, in consequence of which their Lordships assoilzied his Grace on the 21st of December, 1827, but found no expenses due.\*

A verdict was afterwards obtained for a large sum of money against the representatives of the Earl of Peterborough, under the clause of warrandice.

In the meanwhile Mr Innes died, and his widow, as his executrix, was sisted as pursuer in his place; and the Duke of Gordon having also died, his testamentary trustees and executors appeared as defenders.

*Mrs Innes appealed* both against the judgments in relation to violent profits, and also against those in regard to the meliorations, maintaining that on the latter point the interlocutor had not been pronounced by a lawful majority, and on the merits that Mr Innes was a bona fide possessor, and therefore not liable in violent profits till the date of the judgment of the House of Lords on the 5th July, 1822, and that he was entitled to be repaid the amount of his meliorations.

With reference to the latter point,

*Brougham, for the appellant*, contended, that the question here, is not the way, the extent, or how the payment is to be arranged, or if to come against the present heir, or how, but, have we a right to get any thing? And, unless you think that we cannot get a shilling, this judgment cannot be supported. But if there is a difficulty as to the arrangement of the payment, then remit the case, and the difficulty will be settled one way or another. But be the arrangement what it may, the appellant is entitled to a consideration for the sum expended in ameliorations.

*Lord Wynford*.—Some civilians confine the claim to what was necessarily laid out on the lands.

*Brougham*.—Some of the civilians do make that distinction; that is, between expense necessary to keep the lands as they were, and expense in absolute improvements. But the weight of authority clearly admits both claims. The doctrine is founded on the principle, debitor non presumitur donare; that holds in cases of bona fides. But where a party has been in mala fide, the law, instead of giving him the advantage of that presumption, takes the reverse, presumitur donare. In that consists

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\* See 6 Shaw and Dun., p. 279, where the argument is fully reported, and the opinions of the Judges given.

Nov. 10, 1830. *Lord Stair's mistake.* The respondents try to get the better of these authorities, by saying, that they do not apply to a lease. But that is a mere absurd sophism. The tenant in a lease lays out money in ameliorations, exactly as he does when he conceives the property, the solum, to be his own. He does so for his own advantage; and he gets the advantage he expects during his life, if he be a liferenter, or during the subsistence of the lease, if for a term of years.

*Lord Wynford.*—If the respondents would allow you to keep the lease until the end of the term, I suppose you would not trouble them for ameliorations.

*Brougham.*—Certainly not. That opens the very case. The tenant does not lay the ameliorations in solo alieno, but suo solo for the time. That is the distinction; and yet, because the ground is not out and out the tenant's, the respondents raise the argument, that the case of tenancy is excluded.

*The Duke's executors contended,* on the other hand, that there was a lawful majority of votes, but that any decision as to this was immaterial, seeing that the question before the House must be, whether, on the merits, the pleas on the other side were well founded;—that, under the circumstances, it was impossible to view Mr Innes as a bona fide possessor, whether regard was had to the nature of the title, and the circumstances under which it had been obtained, or to the attempts made to support it; and that, at all events, no claim could be made for meliorations against a party succeeding as heir of entail, by whom the title of possession had been immediately challenged.

*LORD WYNFORD.*—My Lords, the questions that are now for your Lordships' consideration, are raised by appeals against two judgments pronounced by the Court below. My Lords, from the statement in the case, it appears that, very many years ago, the estate of Durris was strictly entailed; and the deed of entail contains these words: that the tenant should not 'alter, infringe, nor innovate this present tailzie, nor 'dispone, wadset, sell, nor away put the said lands, baronies, and others 'aforesaid,' nor contract debts. This estate descended in the female line to the late Lord Peterborough. Whilst Lord Peterborough was in possession, being in a state of distress, he was anxious, if he could, to break through the fetters of this entail, and to sell the estate. A sale was actually accomplished with a person who stands in a very near connexion to the party who afterwards took the lease on which these questions arise,—a very important circumstance in the consideration of this case. The party who afterwards took the lease was not only connected with the intended purchaser, but also the Writer to the Signet who managed for that person. The sale that was attempted was defeated, it being

determined by the Court in Scotland, that the entail could not be broken Nov. 10, 1830. through. The determination was appealed against, but the appeal was abandoned. After this, my Lord Peterborough granted to Mr Innes a lease of this property; that lease was vacated by the judgment of the Court of Session. That lease being vacated by the judgment of the Court below, the persons who have succeeded to the estate of Lord Peterborough claimed the violent profits of the estate; and the representatives of Mr Innes, the lessee, insisted that they ought to be paid for meliorations of the property during the period from the time of the granting of the lease up to the year 1814, when they were served with process in the cause for reducing that lease.

Upon the first point, the judgment of the Lord Ordinary was, that Mr Innes was to be considered as liable to pay violent profits from the period of a decision pronounced in this House, in the month of July, 1819; because the Lord Ordinary considered that, at that time, it was quite impossible that Mr Innes must not know that any appeal to this House must be fruitless, inasmuch as, by the judgment then given by this House in the case of the Duke of Queensberry, it was determined that, under the word 'dispone,' which I have stated to your Lordships occurs in this settlement, the lease was void under the entail. When the question, however, came before the whole Court, the judges were of opinion, that the claim for violent profits should be carried back further, and that Mr Innes should be considered as liable to pay these from the time when they, in the Court below, pronounced their decision for the reduction of the lease; and the question that is raised by this appeal is, Was the Lord Ordinary right in ordering the violent profits to be paid from the month of July, when all hope of success upon the appeal was put an end to by the decision of the Duke of Queensberry's case? Or, Was the Court below right in deciding, that he was bound to pay those profits four months sooner, namely, from March in that year? My Lords, if there was not another question behind, I should have inclined to think that the Lord Ordinary was right, and the Court wrong; because, undoubtedly, from the state the Scotch law was in at that time, there was enough of doubt to encourage any man to bring his appeal before this House;—but I humbly submit to your Lordships, that it will not be necessary for us to consider this point, which has been a good deal argued before us, because I am decidedly of opinion, upon another ground, that Mr Innes was liable for violent profits from the time of the judgment; nay, I think he might have been rendered liable to violent profits from an antecedent period. Reference has been made to Mr Erskine to prove that a party is to be considered in mala fide when he continues in possession after being served with process. I think, when a person is served with process in an action, that he should make up his mind, whether he will try the cause, or surrender the estate. If he thinks proper to try the cause, he ought to take upon himself all the consequences of that conduct, and that it would be right to subject him to be called upon for violent profits from the period of the service. That rule would carry back the claim much beyond the date to which the present judgment carries it; but Mr

Nov. 10, 1830. Erskine adds, in the passage alluded to—‘In favourable cases, they have postponed the period when violent profits became chargeable, from that of the service of the process to that of the final decision.’ That, perhaps, brings us to the point upon which this cause is decided, namely, Whether this is that species of favourable case? Whether there is that kind of bona fides that entitles Mr Innes to be excused from the payment of violent profits to the period when the decision was pronounced, deciding the rights between him and the heritor of this estate? Or, Whether it is not a case which is not entitled to the favourable consideration of this House? I think there is nothing like bona fides in this case; on the contrary, if we look at the transaction from the beginning to the end, we shall see, that it is a case in which a man, conversant with the law of Scotland, is taking advantage of the distresses of the heritor of this estate, to injure the estate whilst it is in his hands. I think, therefore, that the judgment of the Court below in the action for violent profits should be affirmed.

This brings us to the appeal in the action brought by the representatives of Mr Innes for ameliorations. In this case we are presented with the civil law—and I am speaking in the presence of those whose attention has been lately directed to the amendment of our law; it is worthy of their consideration, whether our law should not be rendered more like the law of all the other civilized states of the world than it is at present, upon the point which gives rise to the present discussion. By our law, if I build upon my neighbour’s land, thinking the land is mine, he takes that land and takes my house, without making me any compensation. By the civil law—which is the law administered in Holland, according to the authority of Huberis; and in Spain, according to the authority of Garcias; and in France, according to the authority of Pothier; and by the general and public law, according to Grotius and Cicero—if a man is in possession of property, and, believing it to be his own, improves that property, the person who recovers that property from him must either, as it is stated in the Digest, pay him for the improvements that he has made; or, if he is poor, and not able to make the payments, he is to allow the improver to remove those improvements, leaving the estate in the same condition as it was previously to the making of such improvements. Mr Brougham stopped short in quoting Grotius, and left it, as if, in all cases where a man builds a house upon the land of another, he is entitled to be paid for the house when required to give up the land. I was astonished at the construction that was put upon that writer upon the law of nations; because, if one person enters upon the land of another wrongfully, and improves it, he has no right to be paid for the improvements that he has made. The passage in Grotius must be taken with the qualification put upon it by the writers I have enumerated; and, by the language of the civil Code, the improvements for which a claim can be supported must be made whilst the party who makes those improvements is not conscious that the property improved is not his; and you must collect his opinion, not from any declaration, but from the nature of the transaction, from the words used in the different instruments, and from

the whole conduct of the parties. Where a case is clearly made out to be Nov. 10, 1832. free from all suspicion that the party knew that the property was not his, he ought to be allowed for improvements; but, if all suspicion of that knowledge is not removed, he ought not to be allowed any thing. If that is not the rule by which Courts are governed, a man may take possession of my property, and ruin me by improvements. That cannot be done.

Now, that being the principle, let us look at all the circumstances of this case, and see if it is possible for any man to entertain a doubt that Mr Innes always suspected the validity of this lease, and was therefore conscious that he was not the rightful possessor of the estate. We must not forget the attempt that was made before the lease was granted. Are there not grounds for suspicion, that this last was another mode of succeeding in the attempt in which they had been before defeated, to get rid of the entail? Then, let us come to the lease itself, and see, whether the lease does not clearly shew, from the very extraordinary terms of it, that there was not the least good faith in it. In the first place, It is not a lease of any one farm, nor of any two or three farms, but a lease of all the property that Lord Peterborough had in Scotland, with all the rights and advantages that belonged to it, or were in any way connected with it, or could be derived from it. Even the pews in the church are conveyed, and the right of appointing to the living. Lord Peterborough could not lease away the patronage of the living, but he makes himself an attorney to appoint to the kirk whoever this gentleman should recommend. Then the game is all conveyed away; but there is a curious reservation. Though the game is leased, Lord Peterborough may himself come and shoot over the lands, but he must not be attended by any gamekeeper: and it is not very likely he would trouble the estate for the purpose of shooting game under any such circumstances. The lease is for three 19 years—to commence after the death of a young man of thirty-five; so that your Lordships must take it that this is an effectual disposition of this property for a period very little short of one hundred years; and persons in the habit of calculating these matters, would not consider the freehold, after this period of one hundred years, as worth much. It is, in substance, and we cannot shut our eyes against it, a conveyance of all the property, and all that belongs to it, except one thing, and that they could not convey by lease, namely, the right of voting. Then, my Lords, I come to another thing which is decisive. Mr Brougham touched upon it, but glanced away immediately, as he thought most prudent; because a man of his knowledge and experience could not have looked at that lease for a moment, without seeing that it is grossly fraudulent. When I use the term grossly fraudulent, I do not mean it offensively; I mean in point of law. I allude to the lease of the mines. Did any man ever see a lease with a reserved rent stipulated, under which the lessee was to have liberty to open any mines, and carry away minerals, paying nothing for them? In an office I had the honour of holding for some time, I was pretty conversant with these leases, and I never saw one where the reservation did not correspond with the quan-



Nov. 10, 1830. tity of mineral brought to grass, as was the phrase in those leases; I mean in the Duchy of Cornwall. Now, here this gentleman is to dig out the bowels of the earth, and carry it away, and pay nothing for it. Mr Brougham says, it is necessary to take up lime to manure the estate, and coal for the use of the tenant. Then the right should have been restricted to these two articles; but if the right of opening mines is general and unquestioned, coals might be taken for sale, and any other minerals that they might find might be raised. But the part of the lease relating to the timber is also very extraordinary. This tenant taking possession of the estate, upon which we are to assume trees were growing fit to be cut, is to be at liberty to cut three acres, and not to plant ten or twenty acres, which would be the case if the lease was honestly made, but he is to plant one acre of young trees for every three he cuts down. Is not this a fraud upon the owner of the estate? And then, when he plants one acre, what is to become of it at the end of the lease? The landlord is to pay for one-half; and, if he does not do that, the tenant is to take the timber away. Did any man ever see such a covenant? But it is said this man was misled. He consulted professional men, and they misled him. No man will lay out £5000 in the purchase of an estate without consulting counsel; but I state, as one of the Judges in the Court below stated, that the opinions given by those counsel, instead of inducing any man to think that this lease could be made, would induce him to think it was the most dangerous speculation he could enter into; for it is, in substance, neither more nor less than this—This is the very best way in which it could be done, but we do not insure you from risk; that is not to be got rid of by any conveyance; and that risk arises from the narrow estate of the gentleman about to grant it. Is not this enough to put any man upon his guard? I agree with Dr Lushington, and the able argument put by Mr Robertson, who has addressed your Lordships for the first time since I have had the honour of a seat here; I do not think this gentleman will be very much out of pocket, or have, in equity, much to claim. He has had, for many years, about £3000 a-year clear; and he has expended for that £43,000. I do not think he is much out of pocket if an enquiry was to be gone into. The question is, Whether any enquiry ought to be gone into? I had satisfied myself upon these grounds before I retired to rest last night; but this morning I have looked at a statute I was not before aware of, which decides this case at once. Mr Robertson referred to it, but he referred to it as the 55th Geo. III. It is the statute of the 10th Geo. III.; and I am almost warranted in saying, that this lease is a fraud upon that statute. Let us look at the statute of 10th Geo. III. Before that statute passed, the only statute that bore upon the subject was the famous statute of Scotch Entails of 1685. Now, this statute recites the statute of Scotch Entails of 1685, and gives not only a commentary upon that statute, but a history of the practice under it. It says,—‘And whereas many taillics of lands and estates in Scotland, made as well before as after passing the said act, do contain clauses limiting the heirs of entail from granting tacks or leases of a longer endurance than

‘ their own lives;’ so that, under the first statute, they could grant no Nov. 10, 1630, leases longer than their own lives—‘ for a small number of years only.’ Your Lordships will not consider seventy-six years after the death of a man aged thirty-five, ‘ a small number of years only,’—‘ and that much ‘ mischief arises to the public from adhering rigidly to this statute.’ It allows you to make leases for two lives, or any number of years not exceeding thirty-one years. If you can make four leases for nineteen years each, what becomes of that statute? It is gone from the Statute-book. But, in the next clause, if you grant a term exceeding nineteen years, it shall contain a clause compelling the tenant to fence and enclose. This gentleman has charged for fencing and enclosing, although, as his lease was for four times nineteen years, he was bound to do it. Then, the statute points out a great number of regulations as to giving notice to all those interested. No notice has been given in this case; this notice is to be given in order that the parties interested may come and see whether that which is doing is beneficial to the estate. I do not see how it is possible that any one can consider that a lease of this description could be sustained after that statute passed; for when the Legislature says, in the 10th Geo. III., you have only had power to grant leases for a short term, but we will give you something more; we will give you a right to grant a lease for thirty-one years—how is it to be endured after that, that a lease is to be granted for four or five times nineteen years? If you can do that, you may do it for a hundred times nineteen years, and grant away the estate. Mr Robertson has satisfied me, that this lease is directly against the policy of this statute. I am quite satisfied that the tenant was aware of it from his conduct. It is evident from what he does. He does not rely upon his lease; he takes a warranty. Why take a warranty, if there was no doubt of the validity of the lease? There was nothing like bona fides in the transaction. This gentleman was always aware he had got a title that could not be sustained if ever it was questioned; and that being the case, it appears to me inconsistent with law and policy to exempt him either from violent rents, or to allow him for those ameliorations which he has employed upon the property. If he has acted with prudence, which no doubt he has, he has abundantly repaid himself from 1774 to 1814, when he was first interrupted, for all he could have expended for ameliorations. As to violent rents, there is no reason why he should not be held liable for that.

I should, therefore, humbly move your Lordships, that these appeals should be dismissed. I have had some difficulty upon another point, namely, the costs. As to the ameliorations, it appears there was a division of opinion amongst the Judges. I cannot, on that account, recommend your Lordships to give costs in that case. Differences of opinion amongst Judges occasion appeals. Then, upon the other case, at the time that appeal was lodged the law was doubtful, and the doubt was not removed for four months afterwards. Under these circumstances, I should advise your Lordships, in both cases, to dismiss the appeals, without costs.

Nov. 10, 1830. The House of Lords accordingly 'ordered and adjudged that 'the Interlocutors complained of be affirmed.'

*Appellant's Authorities.*—(*Bona Fides.*)—Dig. lib. 6. tit. 1. § 38; lib. 12. tit. 6. § 33; lib. 20. tit. 1. § 29; lib. 41. tit. 7. § 12; Grotius, lib. 2. c. 10. § 2; Pothier de Propriété, p. 2. cap. 1. art. 6. § 343. 347; Leyser ad Pand; Spec. 447. vol. 7. p. 88; Vinnius, lib. 2. tit. 1. § 30. p. 157; Garsias de Melior, c. 14. § 10. fol. 309; 1 Müller voce *Ædificatio*, p. 127. § 5; Dig. lib. 12. tit. 6. § 33; Müller voce *Retentio*, 471. § 18. 478. § 73; Berger *Economia Juris de Dominio*, lib. 2. tit. 2. p. 216; 5 Voet. 3. 23; Garsias, c. 6. § 3. fol. 273; 1 Huber, p. 100; Franc Zypin *Notitia Juris Belgicæ*, vol. 2. p. 51. § 12; Pothier *Traité Negot. Gest.* § 1. art. 3. case 2. § 192; 1 Stair, 8. 6. 1; Bank. 9. 4; 3 Ersk. 1. 11; Kames's *Pr. of Eq.* b. 1. p. 1. § 2. art. 1; Blinning, 18th Jan. 1676, (13401); Jack, 23d Feb. 1665, (3213); Halket, 24th Jan. 1762, (13412); Guthrie, 2d Feb. 1672, (10137); Halliday, 20th Feb. 1706, (13419); Rutherford, 28th Feb. 1762, (13422); Mackenzie, March 8, 1793, (13370); 2 Stair, 1. 40; Müller voce *Posses. Mal. Fid.* p. 540. § 8. and p. 524; Pothier de *Propriété*, p. 2. c. 1. art. 5. § 3; 2 Ersk. 1. 25; Maxwell, 9th Feb. 1693, (1697); Grant, 9th Feb. 1765, (1760).—(*Entail*).—Müller *Fid. Com.* p. 161. § 4. 94 and 115; Garsias, p. 313; Berger, p. 312 and 372.

*Respondents' Authorities.*—(*Bona Fides.*)—Domat. 1. 81. p. 272; Voet ad Pand. lib. 6. tit. 1. § 36, 37, and 38; Vinnius ad Inst. lib. 2. tit. 1. § 30; Zeevius, lib. 41. tit. 1. § 58-61, and 80.—(*Entail*).—2 Stair, 1. 24; 2 Ersk. 1. 25; 1 Bank. 8. 12. and 2. 19. 25; Kames's *Pr. of Eq.* p. 114; Blair, Nov. 18, 1783, (1775); Cardross, Jan. 2, 1711, (1747); Bruce, July, 1822, in H. of L. (1 Shaw, 213.); Hodge, Feb. 13, 1664, (2651); Burns, Dec. 4, 1735, (13402); Dillon, Jan. 14, 1738, (15432); Webster, Dec. 7, 1791, (Bell's Cases v. Entail, No. 7.); Taylor, eo die, (Ibid. No. 8.); Campbell, Feb. 20, 1812, (F. C.); Tod, Jan. 14, 1823, (2 S. and D. No. 110. p. 113.) affirmed May 27, 1825. (Ante I. 217.) 10 Geo. III. c. 51.

J. CHALMER,—SPOTTISWOODE and ROBERTSON,—Solicitors.

No. 38. GEORGE PENTLAND, Appellant.—*Brougham—Romilly.*

LADY GWYDYR and Husband, Respondents.—  
*Lushington.*

*Sale*—Construction of the terms of a Contract of Sale.

*Proof*—Incompetent to control the terms of a written contract by an extrinsic document.

Nov. 12, 1830. The Respondents, proprietors of the estate of Stobhall, in Perthshire, announced for sale, in autumn 1817, a wood on the estate called the wood of Strelitz, or Strelitz plantation. Under this name, two divisions were included, the one containing about 209 acres, and the other about 60 acres. They were separated from each other by a feal (turf) dyke, and a road. About six acres of the larger division were disposed of prior to January

2d Division.  
Lord M'Ken-  
zie.

1818, of which part was purchased by the appellant, Pentland. Nov. 12, 1830. On the 13th of that month he addressed to the land-steward of the respondents this letter :

‘ Sir, Since I had the pleasure of seeing you at Stobhall on the 29th ult., when I purchased the few weedings of large trees, I have been considering your offer or proposal of purchase of the wood of Strelitz, and hereby make you the following offer for the same, viz. L.10 sterling per acre, and to be allowed six years to cut the wood, (as sales are but slow,) and payment to be made each December for the quantity cut during that season ; or, if more agreeable to you, and to avoid all trouble on either side, I will give you L.2000 sterling for the whole lot, payable by bill at one or two years, a discount of five per cent being given me, allowing that sum to have been divided into six yearly payments, of course I being allowed my own time to cut down the wood,’ &c.

No bargain was at this time concluded ; but Pentland having gone to London in March thereafter, had an interview on the subject with Mr Kennedy, the factor and commissioner for the respondents. That gentleman, after some communication with persons connected with the estate in Scotland, and after Pentland had left London, wrote to him on the 21st April this letter :—

‘ From the estimate of the quantity and size of the timber on the Strelitz plantations, it appears that the amount of such valuation, at the lowest average, would be L.2452, for which sum I now make you the offer of that wood, to be cut and paid for according to the agreements drawn out by us when you were in London last ; that is, the whole to be cleared off in three years from commencement of cutting. 2dly, To be paid by bills at six months, dividing the whole into six payments, of which the first payment to be paid in advance, and a bill given at six months for the next payment ; and the wood reserved to be deducted at payment of last bill. 3dly, The screen of wood not to be more than twenty-five Scots acres, nor less than fifteen acres, and chosen by the proprietor or his agents. 4thly, A third of the whole plantation, or nearly so, to be cut and cleared yearly, and that in one part only. If this meets your intentions, you will let me know,’ &c.

To this communication, Pentland, on the 30th, sent the following answer :

Nov. 12, 1830. ' I was favoured with yours of the 21st current, making me  
 ' an offer of the timber on the Strelitz plantations at L.2452  
 ' sterling. Although I have again perambulated them, I really  
 ' think the sum is high ; but I shall throw myself entirely into  
 ' your hands ; and when you consider that it is clearing you  
 ' without further trouble, I hope both Mr Burrell and you will be  
 ' disposed to give me an abatement, and make each payment of  
 ' the six L.350 each, which would make L.2100. That I leave  
 ' entirely to Mr Burrell's consideration and yours ; for a per-  
 ' son taking off-hand such a bargain should have a little latitude,  
 ' as there is considerable risk. Please receive inclosed a bank-  
 ' draft for L.350 sterling, payable to you, or order, which would  
 ' be the first instalment of the price, if allowed to be L.2100 ;  
 ' but if it must be more, I shall send it with the bill for the next  
 ' instalment at six months, on commencing cutting, which I will  
 ' do in a short time. I have informed Mr Fenwick, according  
 ' to your orders, that I have accepted your offer, which I now  
 ' do, leaving the above point to be disposed of as to yourselves  
 ' seems meet ; and I humbly hope it will be granted, as the buyer  
 ' in such a transaction as this should have the cast of the bulk  
 ' (balance), as we say in Scotland, on his side, and which I have  
 ' no doubt will be acceded to in this. Writing Mr Burrell, I  
 ' have mentioned my being favoured with your letter and my  
 ' acceptance, trusting to his goodness in giving this discount.  
 ' And I am sure it must be agreeable to all parties that our  
 ' valuations were so near one another on the whole. Your reply  
 ' in the course of a few posts, as to my humble request, will  
 ' oblige,' &c.

In reply, Mr Kennedy wrote on the 5th of May, that no de-  
 duction could be given, and stating that ' The persons who have  
 ' measured the plantations and trees, Mr Duff and Mr P. M'Ar-  
 ' thur, will attend a meeting at the Strelitz wood, that they may  
 ' point out the exact lines which they have sent up to me, in  
 ' order, previously to cutting any timber, that the quantity may  
 ' be ascertained, so as to form an average price for those acres  
 ' we propose to reserve for shelter ; write to Mr Fenwick to  
 ' give directions accordingly ; and I am,' &c.

After the screen or belt had been marked off, Pentland pro-  
 ceeded to cut the wood, and paid the five first instalments. He  
 failed to complete the cutting within the stipulated time, and  
 alleged that the screen or belt of wood belonged to him in pro-  
 perty, subject only to a right of purchase in favour of the respond-

ents, and that the other division of the plantation was included Nov. 12, 1830. in his purchase. This the respondents disputed, and presented a petition to the Sheriff of Perthshire, praying him to appoint inspectors to measure the screen or belt, so that the value of it in proportion to the rest of the wood might be ascertained; to ordain Pentland forthwith to complete the cutting; and to pay the last instalment, under deduction of the value of the screen or belt of wood. Pentland rested his defence on the ground above mentioned, and insisted that he was entitled to L.40 per acre for the belt, and to deduction of the value of the other division of the plantation, of which delivery was refused to him. On the other hand, the respondents maintained, 1. That the belt had never been sold to Pentland, but had been expressly reserved, subject to a declaration that he was to receive a deduction from the price corresponding to the quantity reserved, and at the rate which he had bought the wood, being about L.12 per acre; and, 2. That it was never intended to sell to him the smaller division of the plantation; and that accordingly he had attended the persons mentioned in the letter of 5th May, who had pointed out the wood actually sold, and which did not embrace that claimed.

With reference to the first of these propositions, the respondents produced a document, written by their factor, Mr Kennedy, in London, but which was not dated nor subscribed. It was in these terms :

‘ Basis of agreement with Mr G. Pentland in London, and L. Kennedy :—Strelitz wood, Stobhall.—To be cleared in three years. To be paid by bills at six months, equally divided, or cash, the first in advance. The part reserved for screen to be deducted, in proportion to the measure, from the value of the whole. With Mr Geo. Pentland of Perth.’

They also founded on some correspondence between Mr Kennedy and certain persons in Scotland, which they alleged Pentland had seen, but which he denied, and of which no evidence was adduced. The Sheriff allowed the respondents a proof inter alia, that ‘ Duff and M’Arthur, or one of them, did attend at Strelitz wood with the defender, and what passed on that occasion as to pointing out the exact lines of the wood, which was contained in the defender’s bargain, and as to the reserved screen.’ The respondents accordingly adduced witnesses, who proved that Pentland was present when the screen or belt was marked off. After the leading witness had deposed, ‘ That he heard no conversation between the defender and any of those

Nov. 12, 1830. 'present relative to the defender's bargain,' he was asked, 'whether, upon the occasion of marking off the screen, the defender advanced any claim to the natural growing fir wood, and the old wood partly cut down, lying on the south side of what was marked off for the screen, and of the feal dyke running up the same. Objected to by the defender, because the witness has already deposed that he heard none of the conversation betwixt the parties in regard to the subject of this question. And the question being allowed and put, deposes that he did not hear the defender make any such claim.'

The Sheriff found, 1st, That the above memorandum produced by the respondents must be held as the agreement alluded to in the letter of the 21st of April, 1818; and that the wood reserved for the screen must be deducted from the last payment, in proportion to the measure, from the value of the whole wood. And 2d, That it was proved, that the one division of the wood was separated from the other by a feal dyke; that the reserved screen of wood was marked off in presence of Pentland, and was bounded by the feal dyke: and that, under all the circumstances, Pentland must have known that the wood sold to him was the wood included within the reserved screen, and did not include the wood beyond it: That the value of the reserved screen, at the rate at which Pentland had purchased, was L.210; and, under deduction of that sum, decerned for the last instalment.

Pentland then brought an advocacy and an action of declarator, in the Court of Session, to have it found that he was entitled to the division of the plantation, besides that of which he had got possession; and that the screen or belt had been sold to him, and therefore must be repurchased by the respondents. The Lord Ordinary in the advocacy remitted simpliciter, and in the declarator assoilzied; and to this judgment the Court adhered, on the 23d of May, 1826.\*

Pentland appealed.

*Appellant.*—The judgments are incompetent, as the matter of fact ought to have been sent for decision by a Jury. Supposing, however, that it were competent for the Court of Session to decide the matter of fact, the judgments rest on evidence totally inadmissible. 1st, It is a settled rule that where a bargain is completed in writing, no extrinsic evidence can be received to control the terms of the written bargain.

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\* 4 Shaw and Dunlop, Appendix.

But the document denominated 'basis of agreement,' was admitted as evidence to control the terms of the interchanged missives, although it was a latent writing which remained in the hands of the respondents' factor, and was never communicated to the appellant. 2d, The parole evidence was also inadmissible, and particularly the question put to the witness in regard to the import of a conversation which he had previously sworn he had not heard.

*Respondents.* It was not incompetent for the Court of Session to decide the matter of fact. They might, no doubt, if they had thought fit, have sent it for trial to a Jury; but this was entirely optional. Besides, the appellant did not ask the Court to remit the case to a Jury. In regard to the evidence objected to, it was plain, 1st, That the memorandum was admissible, because an agreement was referred to in the missives, and it was not pretended by the appellant that there was any other document constituting the agreement except that memorandum. And, 2d, The question put to the witness was unimportant; because, independent of it, there is ample real evidence to support the judgments.

**LORD WYNFORD.**—The extent of the wood was a question of fact, and was fit for a trial by Jury; but the parties did not ask to have it sent to the Jury Court, but submitted it to the decision of the Court of Session. I think that, after the Court of Session have decided the case—and, as I think, rightly decided it—your Lordships ought not now to direct it to be tried by a Jury. But it has been objected that papers were read in evidence which ought not to have been admitted, and questions put to a witness which ought not to have been permitted to be put. I am of opinion that the paper found in London was not evidence. If this case had been tried by a Jury, and that paper had been given in evidence, I should have recommended your Lordships to direct a new trial, because we should have had no means of knowing whether the verdict of the Jury had not passed on that paper, which ought not to have been in evidence. But we know that that paper had no effect on the Court of Session, for the Judges of that Court have said that they paid no attention to it; and I think that there is evidence enough to support the judgment of the Court of Session, without considering the contents of the objectionable paper, [The rest of Lord Wynford's observations were addressed to matters of fact, and to the construction of the contract of sale. From the observations on the contract no general rule can be deduced, and they are therefore not reported.] His Lordship moved that the appeal be dismissed, with L.100 costs.

The House of Lords accordingly ordered and adjudged that



Nov. 12, 1830. the Interlocutors complained of be affirmed, with L.100 costs.

MEGGISON and POOLE,—SPOTTISWOODE and ROBERTSON,—  
Solicitors.

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No. 39. MRS MEAD or MACKENZIE and Husband, Appellants.—  
*Brougham—Knight.*

WILLIAM ANDERSON, Respondent.—*Spankie—Robertson.*

*Heritable or Movable.*—Where a party sold heritable subjects by missives, and the price, payable at a future period, was declared a burden on the subjects: Held (affirming the judgment of the Court of Session) that the price was heritable, and not carried by an English testament.

Nov. 16, 1830. THE late Henry Anderson, who resided in England, was one  
2D DIVISION. of several pro indiviso proprietors of certain heritable subjects  
Lord Medwyn. situated in Broughton, immediately adjacent to Edinburgh. In  
virtue of a power of attorney granted by him and certain other  
of the proprietors to Mr Thomas Baillie, W.S., that gentleman  
sold to Mr James Pedie, W.S., on the 2d of November, 1822, by  
missive letters, their shares of the property, at the price of  
L.2700. In the offer by Mr Pedie it was stipulated that the  
price should be 'payable as follows, viz. two-thirds thereof two  
' years after Whitsunday next, which is to be my term of entry  
' to the premises, and to bear interest from said term of Whit-  
' sunday 1823 at four per cent, and to remain a burden over the  
' property until paid, and the remaining third part of it to be  
' payable at Whitsunday next.' In October, 1823, Mr Ander-  
son died, at which time no farther title had been granted to Mr  
Pedie. Mr Anderson left a will, in the English form, dated  
in 1819, in favour of his niece, the appellant, Mrs Mead or  
Mackenzie. The disposing clause was in these terms: 'I give,  
' devise, and bequeathe, all, and every, my freehold estates in  
' England, or elsewhere,' and in general his whole property  
and effects, wherever situated. His brother, the respondent,  
William Anderson, was his heir at law. A competition then took  
place between these parties in regard to that part of the price  
which had been declared a burden on the property, and remained  
in that situation at the death of Mr Henry Anderson—the ap-  
pellants contending that it was to be regarded as movable,  
and so carried by the will, while Mr Anderson maintained

that it was heritable, and could not be so transmitted. To settle Nov. 16, 1830. this question, Mr Pedie brought a multiplepinding, in which the Lord Ordinary found, ' That quoad the two-thirds of the ' price which were to remain a real burden over the property, till ' paid, there was no change from heritable to movable, in consequence of the sale of the property, and that the same cannot be ' carried by the said will, just as little as Henry's share in the ' property would have been if he had died before the sale, but ' that it belongs to the heir of the said Henry Anderson ; and appointed the cause to be called to apply these findings.' To this judgment the Court, on the 27th of June, 1828, adhered.\*

Mrs Mackenzie and Husband appealed.

*Appellants.*—1. By the sale to Mr Pedie, Mr Henry Anderson was completely divested of the property, which, although not formally, yet substantially, was thenceforth vested in Mr Pedie. The right which now belonged to Mr Anderson was a claim for the price. But such a claim is of a movable, and not of an heritable nature. It is true that Mr Pedie stipulated for indulgence as to the term of payment, and agreed that, for the security of Mr Anderson, the price should remain a burden over the property ; but this cannot affect a question of succession arising on the death of Mr Anderson. By the act of converting the heritable into a movable subject, Mr Anderson clearly demonstrated his intention and will that his property was to be considered as movable. The circumstance that Mr Pedie found it inconvenient to pay the price, and offered security, cannot affect the question as to the animus of Mr Anderson. Besides, the price was never made, in proper form, an heritable or real burden.

2. Although power was conferred on Mr Baillie to sell the property, and so convert it from an heritable to a movable subject, yet there was none bestowed upon him to defeat that which was the evident intention of Mr Anderson, by taking the price payable in such a form as to alter the order of succession.

3. But assuming that there was such a power, still the price was merely created a burden on the property ; and there is no authority for holding that such a burden is heritable in a question of succession. Even if it were so, it was transmissible by assignation ; and as the testament gave, bequeathed, and devised

Nov. 16, 1830. all Mr Anderson's effects to the appellant, it was effectual to transfer the price to her.

*Respondent.*—1. In judging of a question of succession the rule of law is, *tempore mortis inspiciendum*. The sale was made in November, 1822, and Mr Anderson lived till October, 1823, during which time, and in particular at that latter period, the price remained an heritable burden over the property. A burden of this nature is not one created like an ordinary heritable bond, by advancing money, and so constituting for the first time an heritable right; but is a reservation or continuation of the heritable right created by the infestment of the seller;—so that, until it be discharged, his right in the property remains as completely heritable as if he had never sold it. But if an heritable bond would have gone to the heir, (which it would undoubtedly have done,) a *fortiori* must a reserved burden. The argument, therefore, of the appellants, that the property was actually converted into money, is rested on an erroneous assumption.

2. Full powers were bestowed on Mr Baillie to dispose of the property as he should see fit; and by the nature of the transaction, the actual and complete transfer of it was postponed for the period stipulated in the missives; and as Mr Anderson lived for nearly twelve months thereafter, he must be presumed to have approved of the transaction.

3. It is undoubted law that a burden created over an heritable subject is heritable in a question of succession; and it is equally clear that an heritable right cannot be carried by a testament.

LORD WYNFORD.—My Lords, when this case was argued the other day, I requested your Lordships to allow a little time for the consideration of it; because, although it did not occur to me that there was any great difficulty in it, yet in a case where the question involves a practice which has long existed, and by which real property is governed throughout all Scotland, it appeared to myself, and to the noble Earl\* whose assistance I had upon that occasion, that it would be as well to consider what the practice and understanding of the profession had been upon this point. My Lords, this is an action of multiplepounding—a term which is not very intelligible to English ears, and, perhaps, I may not make myself better understood to some of your Lordships when I say, that it is like a bill of interpleader in this country. When a man is called to pay money to different persons, he says, I am ready to pay whoever shall be entitled to it; and as A and B both lay a claim to it, I beg that A and B will settle

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\* The Earl of Radnor.

is between themselves, and, when they have done so, I shall pay to whomsoever shall be found entitled. This is the nature of the present proceeding. Nov. 16, 1830.

A Mr Anderson was possessed of some real property, which became divisible into seven different parts; and, without stating to your Lordships the details of the division upon the present occasion, it is only necessary to say, that three parts became the property of the present appellant's uncle, and one part became the property of the present respondent. The question for the decision of your Lordships to-day, arises with respect to the three parts which came to the appellant's uncle. Before the uncle's death, this property was all sold to the person who is the pursuer in the action of multiplepounding. After the sale, the uncle made a will. If it is to be considered as movable property, it is passed by that will to the appellant. If it is to be considered as what we call real, or what is called in Scotland heritable property, it would not pass by that will, but would become the property of the respondent. Therefore, the real question for your Lordships to decide is, Whether the price of this estate is to be considered as heritable or movable property? Now, before I call your Lordships' attention to the law upon this subject, it will be material to state to your Lordships the instruments of sale of the property. Your Lordships are aware that a sale is completed in Scotland without the solemn deeds required in England. A letter-missive, as it is called, and the answer to it, constitute a sale. Now the offer of sale is in these words. It is written by Mr Pedie, a writer to the signet in Edinburgh: 'Edinburgh, 2d November, 1822.—Sir, I hereby offer you for the three fourth parts of the property at Broughton, belonging to your clients, Messrs Anderson and Mrs Mackenzie, the sum of L.2700 sterling, payable as follows, viz. two-thirds thereof two years after Whitsunday next, which is to be the term of my entry to the premises, and to bear interest from said term of Whitsunday 1823, at four per cent, and'—these are the material words—'and to remain a burden over the property till paid; and the remaining third part to be payable at Whitsunday next.' That is all that is material of the letter. Then, in answer to this, a note is written by Mr Baillie to Mr Pedie:—'Edinburgh, 2d November, 1822.—I accept your offer, before written, on the part of my constituents.' These notes constitute a conveyance of this property. The testator did not die till after the first instalment, which was payable at Whitsunday, had been actually paid; and, therefore, there is no dispute about that. The dispute is with respect to the remaining three parts, which are a charge, in the words I have read to your Lordships, 'to remain a burden over the property till paid.' Now, on the part of the appellants, it is contended that the Court below were wrong in deciding that this is to be considered as heritable property. On the part of the appellants it is contended, that though this, whilst it existed as an estate, was unquestionably heritable property, yet, by the act of sale, a disposition is shown to convert that which was heritable property into movable property, and therefore that it became movable property. On the other hand, it is said, No, it is not converted into movable property; but that, by the operation of the words, (which I have read to your Lordships,) though

Nov. 16, 1830. the estate be gone, that is, though the land be gone, there is an heritable property in the price of that estate, created by the use of those words. The appellants insist, also, before your Lordships, that, to create an heritable property, certain solemnities are necessary in the instruments by which that is to be effected; and it will be material for me to mention that, in support of that argument, the appellants refer to a very learned writer, Mr Bell.\* Now, I beg your Lordships to attend to what Mr Bell says; and I think your Lordships will find that the very authority to which they have referred decides that point against them. There can be no doubt that, if a new heritable estate was to be created, all the solemnities pointed out by the appellants would be necessary to give effect to that estate; and therefore, if that were the case, your Lordships would have to say, that, whatever the testator intended, he has not carried that intention into effect by sufficient legal forms; and it seems to me that that objection, if it were well founded, would dispose of that part of the case. But then it is said, on the other hand—We admit that, if the ancestor had not any heritable interest in this property, this instrument would not have created an heritable interest; but we say that the heritable interest that was in him remained in this part of the property till the money was paid. The question is—Whether there did not remain in him an heritable interest out of the old estate, which is not got rid of till the price of that estate is paid? Now, my Lords, it was very ingeniously argued at your Lordships' bar, that, in this case, the whole interest in the land was parted with, and that nothing but the burden upon the land remained. But it occurred to me, I confess, at the time, that the burden upon the land must constitute an heritable interest in the land. The burden enables the person who had that burden to possess himself of the estate, in case the price should not be paid—otherwise what security is it? If the man had no security against the land, of what avail would be those words, "to remain a burden over the property till paid?" It appeared to me, therefore, that, upon that principle, it was not to be considered that the whole heritable interest was gone, and that this was a mere lien upon it, but that a sufficient heritable interest remained in the person who is the seller of the estate, in order to entitle him to get possession of the estate, in case the price should not be paid. My Lords, I am borne out in this by the learned writer whose name I have already mentioned. Mr Bell says—'The price may be allowed to remain unpaid, 'secured over the land. The security may be constituted either by an 'heritable bond, or by rendering the *price a burden in the conveyance*.' Now, this is not a security constituted by an heritable bond, as I have said; but the question is—Whether it is a security constituted by rendering the price a burden in the conveyance? The words which I have read to your Lordships clearly do render the price a burden upon the conveyance. 'In the latter case,' says the same learned writer, 'where a

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\* Bell on Completing Titles, 93.

‘price is declared to be a real burden on the estate by reservation, Nov. 16, 1830. not only is the purchaser’s right burdened, but the seller’s original right is reserved to the extent of the debt, so that the debt stands secured on the seller’s own infeftment ;’ and he afterwards observes, that in the constitution of a lien by reservation, there are two feudal estates. There is one feudal estate conveyed to the purchaser, standing on his infeftment, but burdened with the price ; the real right in the lands, for security of the price reserved in the person of the seller, forms another feudal estate, standing on the seller’s original infeftment.’ The seller’s original infeftment remains still in the representatives of the seller ; and if it does, this is an heritable estate. My Lords, I have, as it is my duty to do, since I heard this case argued, looked at every one of the cases that have been cited on the part of the appellants. In every one of them there is this distinction between them and the present case, that there the property is conveyed away without a conveyance creating an heritable burden ; and then, it is admitted by the respondent that there is no charge upon the land. All the cases referred to, on the part of the appellants, on this part of the case, (with the exception of one I will just mention, before I have done,) are cases where the seller has not, as he has done in this case, reserved any charge upon the land. These authorities, therefore, do not appear to me to bear upon the present case. There is one case, however, that has been mentioned, which I think it right to notice. That is the case of *Waugh v. Jamieson*, (Mor. 5524,) upon which the appellants mainly rely. They say, that the sum may be movable, and yet it may be heritably secured ; and that case is referred to for the purpose of proving, that, though heritably secured, yet it may be movable. In the case of *Waugh v. Jamieson*, it is stated by the reporter that their Lordships came to the following resolution :—That it is consistent that a sum should be movable, and yet that it should be considered heritably secured. Now, my Lords, if this case bore more immediately upon the point than it does, I should be bound to state to your Lordships, that that is not the point decided in the case. This is a mere obiter dictum of the Judges ; and your Lordships well know that the obiter dicta of the Judges are not entitled to that consideration which their opinion, expressed upon the point they are called upon to decide, is entitled to. But if the case be examined still further, your Lordships will find it does not touch this point at all ; because, what was decided ? Why, that it is consistent that a sum should be movable, and yet heritably secured ; and the instance they put is this, ‘as in the case of bygone annual-rents, due upon infeftment of annual-rents.’ Your Lordships know that an infeftment of annual-rents makes the annual-rents an heritable property, just as a rent-charge in this country is real property. In England, if a man grants to another a rent-charge, that rent-charge will descend to the heir of the grantor ; but if there are bygone rents which become due in the lifetime of the grantor, these are said to be fruits-fallen, and go to the executor of the grantor. That is precisely the case upon an infeftment of annual-rents. The property in which the party is infeft is heritable property ; but any bygone annual-rents which become

Nov. 16. 1680. due in the lifetime of the owner of the rent, will belong to his executor.

It appears to me, that, giving full effect to this case, it does not touch the price of the estate. The price of the estate here is precisely in the situation of the infest annual-rents spoken of in this particular case; and then, so far from this decision being against the judgment which has been pronounced by the Court below, it appears to me that it is a decision that goes in support of that judgment. My Lords, for these reasons, I am humbly to submit to your Lordships that the judgment ought to be affirmed. I have already stated to your Lordships that I considered it very important that we should deliberate before we pronounced a decision in this case; because, although the matter in dispute in this case is not large, yet, when your Lordships recollect what confusion would be introduced into property, if we were to decide now that that goes to the executor, which hitherto, according to the practice of Scotland, has gone to the heir, your Lordships cannot but perceive how greatly the descent of property in Scotland would be disturbed; and I conceive that nothing is more mischievous than to disturb any settled rule which has been once established, regulating the descent of property. For these reasons, I humbly submit to your Lordships that the interlocutor in this case should be affirmed. At the same time, I think this is a hard case; because it was the intention of the owner of this property (and if he had used the proper means, he might have carried that intention into effect) to have given this to the lady instead of the gentleman. I think that, considering the hardship of the case, your Lordships will agree with me, that the interlocutor should be affirmed, and that the appeal should be dismissed without costs.

The House of Lords accordingly 'ordered and adjudged that  
'the interlocutors complained of be affirmed.'

*Appellants' Authorities.*—2 Ersk. 3. 17. Forbes, Nov. 1683, (5531.) 2 Bell Com. 9. 10. Wilson, 29th November, 1808. (F. C.) Waugh, 18th February 1676, (5524.) 1 Bell Com. 585. Stewart, 18th May, 1792, (4649.) Winram, 13th February, 1694. (4 Brown, Sup. 53.) Stewart, February, 1615, (5488.) Watson, February 7, 1635, (5489.) M'Nicol, 16th June, 1814. F. C. Lamont, Dec. 4, 1789, (5494.) 1 Bell's Com. 690.

*Respondent's Authorities.*—2 Ersk. 2. 20. 3 Ersk. 8. 20. 3 Stair, 2. 3. 2 Ersk. 2. 5. and 17. Bell on completing Titles, 93. 94. M'Nicol, 31st Jan. 1816. (F. C.) 3 Ersk. 9. 48.

J. and A. SMITH,—J. CHALMER,—Solicitors.

Nov. 17, 1830.

JOHN MARQUIS OF BUTE, Appellant.—  
*Lushington—James Campbell.*

No. 40.

JOHN COOPER and Others, (Executors of the Reverend JAMES COOPER,) Respondents.—*Spankie—Robertson.*

*Presumption.—Proving of the Tenor*—Circumstances under which it was held (affirming the judgment of the Court of Session) that a Bond which had been destroyed, was to be presumed unconditional.

JAMES COOPER, son of Dr Cooper, Professor of Astronomy Nov. 17, 1830.  
 in the University of Glasgow, was educated for the church of Scotland, and, previous to 1809, had been appointed keeper of the College Museum of Glasgow, at a salary of L.65. The late Marquis of Bute, grandfather of the appellant, was about this time residing at Mount Stuart, in the island of Bute, and being desirous to have a fit person to superintend, while there, the studies of his grandson Lord James Stuart, Mr James Cooper was recommended to him, and engaged in the month of January 1809. Mr Cooper remained at Mount Stuart for about four or five months, when he returned to Glasgow; and on the 23d of June, the Marquis wrote to him, stating that he had ordered fifty guineas to be paid to him, and returning him thanks for the attention which he had paid to his grandson. He farther stated, that, ‘situated as I happen to be, without entering into further reasoning, I must observe to you the impossibility of holding out other prospects of assistance than what is personal to myself. Should a vacancy take place, for example, in the kirk of Rothesay, and you competent to the presentation, I pledge my word to bestow it in your favour. In the interim, did it suit your views and convenience to live in my house, I shall gladly receive you, offering you, in such case, a salary of one hundred pounds (L.100,) and to add ten pounds (L.10) more to defray the cost of washing. Such arrangement to date from the moment of your joining me—say the beginning of November next, after your examination. Your journey to be paid for by me; likewise those you may be called upon to make for the same purpose. This salary of L.100 I propose continuing until you get the living of Rothesay; or that you are able to obtain a better provision.’ After making an effort to acquire the Gaelic language, which was essential to qualify him for the church of Rothesay, Mr Cooper wrote to the Marquis on the 24th of August, that he found it

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Nov. 17, 1830. impracticable; that he was therefore obliged to abandon any prospect of a provision from that quarter; but stating that, 'as you formerly mentioned that you were to continue my appointment till I should get the living of Rothesay, or that I am able to get a better provision, you may now, if you judge proper, alter the terms in such a manner, that the appointment shall not continue longer than it probably would have done had I been able, by acquiring the Gaelic language, to have accepted of the church of Rothesay.'

His Lordship was, at this time, desirous to have a tutor to attend his son, Lord Dudley Stuart, and intended to go abroad. Some intermediate correspondence then took place, in which his Lordship mentioned, that although he had no hesitation in asking Mr Cooper to give up his situation as keeper of the Museum, on the supposition that he would be able to accept of the church of Rothesay, when it became vacant, and he could, in the interim, make good the value of his situation as keeper, yet, as matters stood, he could not ask him to do so: but if he thought fit to accept of his proposition, it was still open. This was declined; and on the 8th of November, the Marquis wrote from London to Mr Cooper's father, in these terms:—'Having reflected upon the best means of securing to your James a settled permanency, should he incline to attach himself to my house, I beg to state my readiness to execute a bond of annuity in his favour of L.100, payable out of my landed property. Should the arrangement meet your approbation, it might perhaps preclude the necessity of so immediately attending to the preparations for the church, which could be carried on in any leisure moment. You will be so good to favour me with your answer so soon as you can, directed to London.' To this communication, Mr Cooper's father, on the 11th, made this answer: 'The desire which you express that James should attach himself to your house, cannot but be both to him and me in a high degree flattering, and the arrangement you have the goodness to propose, so far as you have explained it, meets with my hearty approbation. As, however, it would be desirable for James, before it be finally fixed, to know some particulars respecting the nature, and probable duration of his services, I hope your Lordship will not disapprove of leaving the final adjustment open till he comes up, in consequence of your very kind invitation. He is now about ready to set out.' &c. The Marquis, on the 14th, wrote that he intended to go abroad, and to take Mr Cooper with him, which would be highly advantageous to him, and which,

he trusted, would therefore meet with his father's concurrence. Nov. 17, 1830. To this Dr Cooper answered, that his son had set off, but that he was persuaded that he would accept of the proposal with gratitude.

Mr Cooper sailed from Leith on the 19th, and on his arrival in London on the 23d, the Marquis granted to him a bond of annuity for L.100, which was prepared by the late Mr Chalmer, solicitor; and immediately thereafter went abroad with his family, accompanied by Mr Cooper, who sent the bond to his father in Scotland. They returned about July 1810, and his Lordship then ordered his bankers to pay up the arrears of the annuity to Mr Cooper, and to give him credit for the annuity.

Mr Cooper soon thereafter took orders in the Church of England, and, in June 1811, was presented by the Marquis to the rectory of Landough, and in November thereafter to the vicarage of Roath, both in the county of Glamorgan, and producing about L.300 a-year. He continued to reside with the family as tutor to Lord Dudley till August 1812, performing his ecclesiastical duties by means of a curate. Lord Dudley having been sent to school, Mr Cooper entered himself in October of that year as a gentleman commoner of Bennet's College, Cambridge. The annuity was paid till the 26th of November, and it appeared, that in January or February 1813, he had written to his father for the bond, which was immediately sent to him, and delivered by him to the Marquis. His letter to his father was not preserved. On the 5th of February, the Marquis wrote to his bankers, requesting 'the annuity hitherto paid to the Reverend James Cooper, of L.100, may be discontinued, that matter being otherways settled.'

About this time, Mr Cooper showed symptoms of insanity; and having come to the house of the Marquis, his Lordship wrote to Mr Cooper's uncle, (Dr Thomson, who resided near Cambridge,) informing him of the circumstance. In consequence of this, Mr Cooper was removed to Glasgow, and, after a temporary recovery, he relapsed, and never recovered. In December, 1816, he was cognosed by a Jury, who found that he had been insane since December 1812, and his father was appointed his tutor.

The Marquis having died, and been succeeded by the appellant, an action was raised in October 1817 against him, by Dr Cooper, in name of his son, and of himself as his tutor, for payment of the annuity. In defence, the appellant maintained, 1. That the bond having been delivered up, must be held to have been discharged and extinguished, the more especially as

Nov. 17, 1830, it could not be found in the repositories of the late Marquis, by whom it must have been destroyed as a cancelled document; and, 2. That at all events, if it were to be held not to have been validly delivered as an extinguished document, it was incumbent on the pursuers to prove the terms of it—that it was clear, from the correspondence, that it must have been granted conditionally, or till the late Marquis should be able to make an equal, or a better provision, in favour of Mr Cooper; and that by presenting to him the two livings, he had performed that condition.

After some procedure before the Lord Ordinary, as to the necessity of a process of proving the tenor, the Court (of consent of the appellant) dispensed with a formal process of that nature, and allowed evidence to be adduced of the terms of the bond. About this time, (March 1822,) Mr James Cooper died, and his executors brought a supplementary action, concluding to have it found, that the bond had been delivered up when he was insane; that the obligation remained in subsistence till his death; and for L.900, as the bygone annuities. This action having been conjoined with the original one, two witnesses, Dr Meikleham, Professor of Natural Philosophy in the University of Glasgow, and Dr Thomson, Mr Cooper's uncle (of consent of the appellant), were examined, both of whom deposed that they had read the bond—that it was an annuity for life, and that so far as they recollected, it was not qualified by any condition. The Court, on the 22d of June, 1827, found, 'that the bond libelled 'must be held to have been unconditional, and to have been 'granted by the late Marquis of Bute to the late Reverend 'James Cooper, for payment of L.100 per annum, during Mr 'Cooper's life.\*' And thereafter, they remitted the following Issue to be tried by a Jury: 'It having been decided by the 'Court of Session, by interlocutor dated the 22d day of June, '1827, that an unconditional bond of annuity, dated on or 'about the 22d day of November, 1809, was granted by the 'late Marquis of Bute to the late Reverend James Cooper, for 'the payment of L.100 Sterling per annum, during Mr Cooper's 'life: And it being admitted that the said bond was, previous 'to the 10th day of February 1813, transmitted by the said 'James Cooper to the said Marquis of Bute,—Whether, at the 'time the said bond was so transmitted, the said James Cooper

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\* 5 Shaw and Dunlop, p. 831.

‘ was of unsound mind, and incapable of managing his own Nov. 17, 1830.  
 ‘ affairs? or, Whether, at the time the said bond was so trans-  
 ‘ mitted, the obligation therein contained had been extinguished?’  
 The Jury returned a verdict, finding, ‘ on the first Issue, that  
 ‘ at the time the bond was transmitted by the said James Cooper,  
 ‘ he, the said James Cooper, was of unsound mind, and inca-  
 ‘ pable of managing his own affairs: And on the second Issue,  
 ‘ that at the time the said bond was so transmitted, the obli-  
 ‘ gation therein contained had not been extinguished.’ In con-  
 sequence of this verdict, the Court, on the 20th of December,  
 1828, found ‘ the defender liable in payment to the pursuers  
 ‘ of the sum of L.900 sterling, as nine years annuity due to the  
 ‘ late Reverend James Cooper, from the 23d day of November  
 ‘ 1812 years, to the 23d day of November 1821 years, with  
 ‘ simple interest thereon, since the same fell termly due.’†

The Marquis of Bute appealed.

*Appellant.*—1. As the action is founded on a bond, it was incumbent on the respondents either to have produced it, or a decree of proving of the tenor. It is true that the appellant dispensed with a formal action of proving the tenor; but the respondents were nevertheless bound to adduce evidence equally conclusive, as to the terms of the bond, as if the proof had been taken in a regular proving of the tenor. In a process of that nature, the whole contents of the deed must be libelled, with all its limitations and provisions; and clear evidence of the contents must be adduced. But in the present case, neither the scroll, nor any written adminicle, (except the note by the late Marquis to his bankers,) was produced; and the only witnesses were two gentlemen, who were not professionally acquainted with the nature of such deeds, and who gave their testimony at the distance of more than 15 years from the time when they had read the deed. It was impossible, therefore, to hold that there had been satisfactory evidence of the tenor of the bond.

2. From the terms of the correspondence, it must be presumed that it was granted subject to the condition, that so soon as the late Marquis procured for Mr Cooper a better provision, it should come to an end; and as he had presented to him two livings worth L.300 a-year, and the bond had thereupon been delivered up, the condition must be held as having been implemented.

Nov. 17, 1830. The *respondents'* counsel having begun to address the House,

*Lord Wynford* said, My Lords, I think it would be wasting your Lordships' time to allow the learned counsel for the respondents to argue this case. It appears to me to be perfectly clear, notwithstanding the very able arguments you have heard from Dr Lushington and Mr Campbell, that there is not the least pretence for disturbing this judgment. A great many observations have been made upon the evidence, as to the state of mind of this gentleman at the time of the delivery up of the bond, which is the only material point. Now, it appears to me, that we are precluded from considering the effect of that evidence—if we were not, I agree, there are many important observations which might be made as to the condition of this gentleman at that time; but the jury have found the fact of the insanity at that time, and it is not now open to your Lordships to consider the propriety of that finding.

*The Earl of Radnor*.—I beg pardon for interrupting the Noble and Learned Lord; but, I confess, it appears to me that the usual mode of proceeding is, when the appellant has gone through his case, that the respondent is to answer it, and the appellant replies. If there is any reason for going out of the usual course of proceeding in this case, we must discuss the reason for so doing in the absence of the learned counsel; and, I confess, it would be with great diffidence I should object to any course of proceeding proposed by the Noble Lord, but, at the same time, I should be glad to hear his arguments for a departure from the usual course of proceeding; and I should be glad to hear the Noble Lord's reason for deciding without hearing counsel on the other side. The Noble Lord will excuse me for interrupting him.

*Lord Wynford*.—Counsel will withdraw.—(Counsel retired from the bar.)—I consider they have withdrawn. We have never considered it necessary that they should actually withdraw, because it is better they should be present to hear the reasons upon which the judgment is given. If any Noble Lord entertains the least doubt, it is fit that the case should go to its end; but I thought it so clear, that it would be a waste of your Lordships' time to hear it any further argued. I have so much respect for the opinion of any one of your Lordships, that if any Noble Lord entertains the shadow of a doubt, I should think it fit that the case should be heard to the end. If your Lordships expressed a doubt, I should wish the case to be heard through.

*Earl of Radnor*.—I confess I should like to hear the case

go on. I hope for the indulgence of your Lordships for suggesting any thing in opposition to the opinion of the Noble and Learned Lord; but, I must confess, I should like to hear the case go on. I quite agree with the Noble and Learned Lord, that it is most desirable to support the opinion of the jury; but it does not appear to me, that the opinion of the jury is decisive of the case; and though, in point of fact, this gentleman may have been insane at the time the bond was given up, which the appellant does not contend against; and though the verdict may have been correct upon the other point, namely, as to the condition of the bond, and the obligation therein contained—

*Lord Wynford.*—There is no verdict upon that.

*Earl of Radnor.*—The issue is,—‘Whether, at the time the said bond was so transmitted, the obligation therein contained had been extinguished?’

*Lord Wynford.*—That does not touch the previous question; that was not submitted to the jury.

*Earl of Radnor.*—I confess, as the whole of the arguments have struck me, I think it is desirable to hear the counsel argue it.

*Respondents.*—1. The appellant having dispensed with a formal action of proving the tenor, the only question is, whether there be satisfactory evidence of its terms. The existence of the bond is admitted, and is proved by an entry in the books of the agent, Mr Chalmer. It is proved by the letter of the late Marquis, that in place of giving Mr Cooper a temporary allowance of L.100 a-year, which had been rejected, he had agreed to make a permanent provision in his favour, and it is established by his letter to his bankers, that he had granted a bond of annuity of L.100, and the two witnesses who read it recently after its execution, concur in saying, that it was granted for life, and that no condition was attached to it, except that it should be payable out of the landed estates in Scotland.

2. It is impossible to hold that the bond could have been qualified by the condition that it was to terminate when the Marquis should be able to present Mr Cooper to an ecclesiastical living, because this would have been a transaction of a simoniacal nature.

*EARL OF RADNOR.*—Perhaps your Lordships will excuse me—as I took upon me, in the course of the cause yesterday, to interrupt the proceedings, by suggesting to the Noble Lord at the table, a request that

Nov. 17, 1803. the cause might not be summarily decided, but that we might hear the respondents in this case—if I detain your Lordships for a few moments; while I express the grounds on which I have now come to the same decision at which the Noble and Learned Lord on the woolsack had arrived, on hearing the counsel for the appellant. The Noble Lord, from his knowledge of the law, and his great habit of discussing these subjects, came to the conclusion much sooner than I was prepared to do; but on further hearing of the case, and a consideration of all which has been urged, I feel myself bound to come to the same conclusion, but not without considerable pain and some difficulty. It appears to me, I confess, that the whole justice of the case lies on the other side; that there is no ground whatever for imputing to the late Lord But<sup>e</sup>, the present appellant's grandfather, the having entered into a simoniacal contract; and that there is no ground for imputing any unfair dealing to the present appellant, the present Marquis of But<sup>e</sup>; but it appears to me that the present appellant is precluded from the remedy he might have obtained, and becomes a defeated party in this case, in consequence of his own benevolent feelings towards the family of the Coopers, inasmuch as he was willing to waive all legal objections, and unwilling to take advantage of forms; and if satisfactory evidence was produced of the contents of the bond, he declared that he would not stand on forms of technicality. It appears to me, that, if it had been his wish to have stood on those forms of technicality, he might have defeated the claim upon this bond; but he waived that right, as it appears, solely from kind and benevolent feelings to the family of the Coopers; and in consequence of that, the jury have found that Mr Cooper was not of sane mind at the time he delivered up the bond; and I cannot help coming to the belief, from the evidence, however imperfect that evidence may be, by Dr Meikleham and Dr Thomson, that the bond was a bond for an annuity for life. Under all the circumstances, I think that the appellant is precluded from any further proceeding, and that the interlocutors of the Court below must be affirmed; and I have only further to apologize for having been the occasion of occupying the time of your Lordships' House by a continuance of the argument; but it is satisfactory to my mind, that the House has allowed the case to go to its end, by which I have come to a decided opinion, at which I had not arrived on the hearing of the appellant's counsel, that the interlocutors of the Court of Session must be affirmed.

LORD WYNFORD.—I am glad that this case was heard through, because, as it is not a case entirely free from circumstances which ought to create doubt, it ought to be most maturely considered; and, when we recollect that this is the last time at which it can be inquired into, it is undoubtedly fit that it should be sifted to the bottom. I beg to state to your Lordships, that I never did think there was the least pretence for imputing any thing like blame, either to the late Noble Marquis, or to the present appellant; and I think the present appellant owed it to the memory of his grandfather to put the party claiming to proof of his case. The Noble Marquis, from the beginning to the end, has shown that it is not his disposition to defend himself by matters of form; for he

has waived all objections of that nature, and has been most desirous that Nov. 17, 1838. this case should be decided on the principles of justice. My Lords, I will not go into all the particulars of this case; there were originally four questions. The first question was,—Whether any bond existed, and what were the contents of that bond? The second question was,—Whether any interest was payable on the instalments due upon that bond? The third question was,—It being taken for granted, and the fact being undoubted, that the bond was given up and destroyed, Whether that was a delivery up, by the obligee, with an intention of putting an end to the obligation which Lord Bute was under of paying this annuity? or, Whether it was delivered up when he was not capable of knowing what he was doing? The fourth question is,—Whether the obligation was extinguished by any act done by Mr Cooper? or, Whether it was still a subsisting obligation?—a question properly raised, for the purpose of removing any unforeseen difficulty which might arise. The two last questions are put an end to by the verdict of the jury; for they have found that Mr Cooper was insane at the time of the delivery up of the bond, and that the obligation is still an existing obligation, it not having been affected by any act done by Mr Cooper. There, however, remain the two other questions, namely, the question of interest, which is hardly made a point here, or in the Court below. I think there cannot be a doubt, that, by the Scotch law, interest is due; and I wish that, with regard to interest on money lent, the English law were assimilated to the Scotch; for I think it is equitable that if a man retains the money of another, and deprives him of the means of making a beneficial use of it, he should pay for the use of it. I should, therefore, humbly submit to your Lordships, that there is no weight in this objection.

This brings me to the only other question of importance, namely,—Whether a bond existed, and what was the nature of it? That a bond existed there is no doubt. Then, what was the nature of that bond? Was it a conditional, or an absolute bond? If it was an absolute bond, it continued an absolute bond, securing an annuity for life, and the annuity continued payable up to the period of Mr Cooper's death; and, in that case, the sum found due by the Court below would be perfectly correct. It will be material, before I call your Lordships' attention to the evidence, in respect of this bond being an unconditional bond, to desire your Lordships to advert to the distinction between the terms in the letters of Lord Bute;—in respect of the first proposition made, and the subsequent proposition, it being quite clear, that, when the first proposition was made, no bond was ever intended to be given, but that it was intended to rest upon the personal obligation of the Marquis,—‘until you get the living of ‘Rothsay, I will give you L.100 a-year, and L.10 a-year for your washing;’ but no further consideration was then intended. Your Lordships know, that that went off in consequence of Mr Cooper not being able to make himself sufficiently acquainted with the Gaelic language, to qualify himself for taking that living; and, afterwards, Lord Bute appears to have been very anxious that Mr Cooper should have the care of his grandson, and then he writes him a letter, which I am now about to read,—and I



Nov. 17, 1830, think it most important, as your Lordships will perceive the difference between that letter and the former, to which I have before alluded, which referred to an engagement which was considered to be of a temporary nature. The letter is addressed to Dr Cooper, the father, and is in these terms:—‘ Sir, having reflected upon the best means of securing to your son ‘ James a settled permanency, should he incline to attach himself to my ‘ house, I beg to state my readiness to execute a bond of annuity in his ‘ favour of L.100, payable out of my landed property. Should the arrange- ‘ ment meet your approbation, it might perhaps preclude the necessity ‘ of so immediately attending to the preparations for the church, which ‘ could be carried on in any leisure moment. You will be so good to ‘ favour me with your answer as soon as you can, directed to London.’ So that your Lordships see now the church was no longer looked to;—he had given up all idea of his getting into the church, and looked only to that which, in the language of this letter, is described as ‘ settled per- ‘ manency;’ and this letter states that which is material, that that settled permanency was to be payable out of his Lordship’s landed property, which is a circumstance affording strong confirmation to the evidence of the witnesses. This proposal is acceded to, certainly, with the salvo that the young man is to be consulted whether he will agree to it. If he agrees to it, it is to be considered as settled. I conceive it is to be taken for granted that he agreed to it; for the bond was afterwards executed. Now, it is a vast assistance in the administration of justice, when the frail memory of man can be assisted by written documents. Your Lordships perceive here, there is no expression in the letter implying that the same idea still continued, which existed in the mind of Lord Bute when he wrote the first letter; if it had, it is natural to suppose, that he would have said—I make you this, not as a permanent but a temporary settlement, to continue until you get something better. It is important, when we are obliged to trust so much to parole testimony, to have that confirmed by such a document as this, in which he says—the settlement is to be payable out of his landed property; and that is material to shew the permanent interest which Lord Bute was willing to secure to this young man. If Lord Bute was about to secure to him a payment for five or ten years, would it be natural that he should give a security on his landed property? Would not the personal bond of Lord Bute have been sufficient? Would it not have been an act of impertinence and ingratitude, if this gentleman had solicited his Lordship to give him more than his personal bond, and have suggested that it ought to be made a charge on his estate? An engagement of that duration probably would not have lasted beyond the life of Lord Bute; but we know, however well conducted the affairs of a family may be in one life, in another the state of things may be very different; and, considering the security to be one to continue during the life of this young man, it is but justice to the Noble Marquis to say, that he might feel that no other security than one affecting his land might perfectly effect the object which he stated himself to have in view, namely, the furnishing to this individual a permanent income. We come next to the parole evidence; and that certainly is imperfect. It is un-

doubtedly a very awkward thing to have the contents of a written Nov. 17, 1830. instrument of this sort proved by parole testimony, but in numerous instances, where written instruments are lost or destroyed by the various accidents which occur, there is no other way in which the contents of those instruments can be proved. It is said in the present case, there is no scroller copy of the bond,—its contents, therefore, can be proved only in one way, that is, by the testimony of witnesses. If the testimony of witnesses was not competent evidence of the existence of such an instrument, men would be subject to the hardships of losing their rights. Then, if it is the law that such an instrument may be proved by parole testimony, the law must adapt itself to the infirmity of our condition. Those who frame our laws know that human memory is subject to inaccuracy, and that the first perception is frequently erroneous,—that the perception may be imperfectly retained, and that different parts of an instrument will be retained by different persons ;—this is well known to all persons who attend to subjects of this kind ; and your Lordships will find in this case, on referring to the testimony of those two gentlemen, (one the Professor of Natural Philosophy in the University of Glasgow,) that there are between his testimony and that of the other witness, material discrepancies, but they are discrepancies only of such a nature as are considered by the best writers, instead of weakening, actually to confirm the testimony given. Both those persons, however, state this to be a charge on the land, taking the character of an heritable bond. It was, however, a bond of that nature, that Mr Cooper might, if he had suspected dishonour or injustice on the part of this family, which it was impossible he should, considering that he was bound to the family by every tie of gratitude, converted it substantially into an heritable bond. If the Court of Session had seen that it was the intention of the parties that it should be an heritable bond, that Court would have given the remedy. To this instrument those persons speak. The effect of their evidence must be taken to be, that it was the wish of both parties that this should be a bond affecting the land, and nothing short of it. And when we see how many instances occur in which there is great opulence in the parent, but which does not continue with the son, it is the sort of security which would naturally be given, where it was to continue for the life. The occurrence to which I have referred was not likely in the present instance ; but when we see how frequently the property of the father is dissipated by the son, nothing short of that security would have fully satisfied that intention, which, in justice to the late Marquis, I am bound to say it was his anxious desire should be made, namely, the giving a permanent income to this young man. Under these circumstances, my Lords, if this case had come before me as *res nova*, I should have decided as the Court of Session have done. I should have held that this was a security for life, affecting the landed property. But it does not come before your Lordships as *res nova*, but it comes before your Lordships, after having been unanimously decided by the Court of Session, which furnishes a presumption, not, however, incapable of being reversed, that the view taken by the Court of Session is correct. I therefore move your

Nov. 17, 1830. Lordships, that the interlocutors of the Court below be affirmed, with L.50 costs.

The House of Lords accordingly ordered and adjudged that the interlocutors complained of be affirmed, with L.50 costs.

*Appellant's Authorities*—20 Ersk. 1. 56.

*Respondents' Authorities*—Fletcher v. Lord Londe, April 9, 1827.—(1 Bligh, 144.)

J. CHALMER,—A. DOBIE,—Solicitors.

No. 41.

MRS ELIZABETH EWEN OF GRAHAM, Appellant—  
*Wetherell—Lushington.*

MAGISTRATES OF MONTROSE, (Trustees of the late JOHN EWEN,) Respondents.—*Spankie—Robertson.*

*Fraud.—Discharge.*—Where a daughter had rights under her father and mother's contract of marriage, and the father, at a time when she and her husband had just attained majority, were in pecuniary distress, and the husband was about to sail to India, obtained a discharge from them without the assistance of an agent on their part; and the discharge narrated that it was granted in consideration of L.315, agreed to be given by the father out of his own free-will, and from regard to his daughter and husband, (whereas he entertained different sentiments,) and that one half had been instantly paid, (whereas he retained a large part in extinction of an alleged debt, and only gave a promissory-note at twelve months for the balance;) and the other half was to be payable at his death. Held (reversing the judgment of the Court of Session) that the discharge was not binding.

*Testament.—Writ.*—Where a trust-deed of settlement for the foundation of an hospital for boys, was blank as to the sum to be provided, and the number of boys to be admitted—Held (reversing the judgment of the Court of Session) that it was inept.

Nov. 17, 1830.

1st Division.  
Lord Newton.

JOHN EWEN married Janet Middleton in 1766; and on the 7th of December of that year, they executed a post-nuptial contract, by which it was, inter alia, declared, ' That ' the residue of his whole subjects, whether heritable or movable, shall belong to his children equally; declaring hereby, ' that in case the said child or children shall afterwards die ' in minority, without lawful issue of their bodies, and during ' the lifetime of the said Janet Middleton, their mother, then the ' general disposition before written, conceived in her favour, shall ' revive and return to its full force and effect, and she shall have ' the entire and free disposal of the whole effects and subjects, ' whether heritable or movable, hereby conveyed, alike as if

‘ there had not been a child of the marriage in life, at the disso- Nov. 17, 1890.  
 ‘ lution thereof. And in like manner, in case the said John Ewen  
 ‘ shall survive the said Janet Middleton, his spouse, and there  
 ‘ should be a child or children of the marriage in life at the disso-  
 ‘ lution thereof, he binds and obliges himself to aliment, main-  
 ‘ tain, and educate the said child or children suitable to their  
 ‘ station, until they are put in a way of doing for themselves, and  
 ‘ that the subjects, whether heritable or movable, shall belong  
 ‘ to them equally at his death.’ About the period of the execu-  
 tion of this deed the appellant was born—she having been bapti-  
 zed on the 1st of January, 1767. Her mother died soon thereafter,  
 and there was no other child of the marriage. In 1787 she  
 married James Graham, second son of William Graham, Esq.  
 of Morphee. They were both at this time about twenty years of  
 age. In the course of the following year (1788) they had a son,  
 and Mr Graham had resolved to go to India for the purpose of  
 improving his fortune, leaving his wife and child in Scotland.  
 On the evening of the 16th December of that year, a deed deno-  
 minated a post-nuptial contract was executed by Mr Graham,  
 the appellant, and her father, Mr Ewen. It was alleged by the  
 appellant that this deed was prepared by the agent of her father,  
 without the intervention of any agent on her part, and that it was  
 brought by him ready extended, and the immediate subscription  
 of her and her husband required, and they accordingly did so,  
 without having seen the post-nuptial contract which had been  
 made between her father and mother.

The deed proceeded on the narrative of the marriage between  
 the appellant and Graham—that he intended to go abroad, where  
 he might remain for some time, and that it was proper that he  
 should make a provision for his wife and child. It then set forth  
 that ‘ in like manner, the said John Ewen, out of his own free-will,  
 ‘ and from the regard he bears to his said son and daughter, the  
 ‘ parties have, with mutual advice and consent, concerted and set-  
 ‘ tled upon the post-nuptial contract underwritten; therefore, in  
 ‘ pursuance thereof, the said John Ewen bath instantly, at the  
 ‘ making thereof, satisfied and paid to the said James Grahame,  
 ‘ the sum of L.157, 10s., as one moiety of L.315 sterling, which  
 ‘ he has agreed to give in name of tocher or dowery with his said  
 ‘ daughter, of which moiety the said James Grahame and his said  
 ‘ spouse hereby grant the receipt, and discharge the said John  
 ‘ Ewen, his heirs, executors, and successors, thereof, renouncing  
 ‘ the exception of not numerated money, and all other exceptions  
 ‘ and objections on the contrary. And sicklike, the said John Ewen  
 ‘ binds and obliges him and his foresaids to satisfy and pay to the

Nov. 17, 1330. ' said James Grahame, his heirs, executors, or assignees, the remaining moiety or half of the said tocher, being the like sum of ' L.157, 10s. sterling, and that at the first term of Whitsunday or ' Martinmas next, and immediately following, year and day after ' the decease of the said John Ewen, with a fifth part more, &c. ' and which whole sum of L.315 Sterl. is hereby declared to be in ' full satisfaction to the said Mrs Elizabeth Grahame, alias Ewen, ' and her said husband, and they do hereby accept of the same, in ' full contentation to them of all goods, gear, debts, sums of money, ' and other movables whatsoever, which they might anywise ask, ' claim, or crave by and through the decease of the said Janet ' Middleton, her mother, by virtue of her contract of marriage ' with the said John Ewen, her father, or of any clause, article, ' or condition therein contained, which is hereby discharged, to ' all intents and purposes, as fully and effectually as if the same ' was particularly engrossed; or by any other manner of way; ' or by and through the decease of the said John Ewen, her ' father, whenever the same shall happen at the pleasure of God, ' either as bairn's part of gear, dead's third, portion-natural, or ' on any other cause or account whatsoever, good-will only ex- ' cepted.' The deed then concluded with a provision by Grahame of L.500 in favour of his wife and child.

The first moiety of the L.315 was settled by Ewen, discharging an account of L.61, 9s. 3d., which he alleged was due to him by the appellant and her husband, and by granting a promissory-note for L.96, payable twelve months after date. In regard to the other moiety, no other security than the personal obligation contained in the deed was granted for payment of it.

It was alleged by the appellant that at this time her father was in opulent circumstances, and in a profitable trade as a merchant, drawing upon an average about L.700 a-year—that he was possessed of heritable property, and that he had never accounted to the appellant for her mother's share of the goods in communion. These, as well as many other allegations made by the appellant, to the effect of establishing fraud on the part of her father, were denied, and no proof was taken in regard to them. It was, however, admitted that the deed was executed on the evening previous to the departure of the appellant's husband for India, and that it was prepared by Mr Ewen's agent; but it was alleged that ample means for deliberation and consideration were enjoyed by the appellant and her husband before the execution of the deed. It was also admitted that they were little more than twenty-one years of age at the period of its execution.

Mr Ewen survived till 1821, by which time he had accumulated

a fortune of about L.14,000, of which a small part was heritable. Nov. 17, 1830.

On the 19th of October, and while on death-bed, he executed a trust-disposition and deed of settlement in favour of the respondents and others, by which he conveyed to them his whole estates, heritable and movable, for payment of various legacies, and in particular, of an annuity of L.40 in favour of the appellant, and  
' 5thly, for payment to the magistrates and town council of the  
' town of Montrose, the place of my nativity, and the ministers  
' or clergymen of that town, of whatever sect or denomination  
' of Christians they may be, or to any one or more of their number who may be appointed by them, the said magistrates and  
' council, and clergymen, to receive the same, of the sum of  
' L.6000 sterling, for the foundation and establishment of an  
' hospital in Montrose, similar to Robert Gordon's hospital in  
' Aberdeen, for the maintenance, clothing, and education of the  
' lawful sons and grandsons of decayed and indigent burgesses  
' of guild, and craftsmen burgesses of the said town of Montrose;  
' and which sum, and interest and profits arising therefrom, shall  
' remain vested in the said magistrates and town council, and  
' clergymen, and be laid out or managed by them for the purposes aforesaid, under such rules, regulations, and directions  
' as I shall establish and appoint, by any separate deed or writing  
' under my hand; and failing such deed or writing, under rules  
' and regulations similar to those now existing for the government and management of Robert Gordon's hospital in Aberdeen aforesaid; with such additions to, or alterations thereon,  
' as may be made by my said trustees, and which they are hereby  
' empowered to do; and which rules, regulations, and directions,  
' the said magistrates and town council, and clergymen, shall  
' be bound strictly to abide by and observe: And, with respect  
' to the rest, remainder, and residue of my means, property, and  
' estate, including, as a part thereof, the foresaid legacy to the  
' said Baron Grahame, my grandson, in the event of his death  
' before his receiving the same, and also the sums to be secured  
' and set apart by my said trustees for answering and paying the  
' foresaid annuities to my said daughter and the said Elizabeth  
' Wallace, after the said annuities shall cease and determine, and  
' be no longer payable, I hereby will, direct and appoint such residue and remainder to be paid or conveyed and made over by  
' my said trustees to the said magistrates and town council, and  
' clergymen of Montrose, or to any one or more of their number  
' authorized by them to receive the same, as an addition to, and  
' to be employed for the same ends and purposes with the foresaid legacy of L.6000: Declaring, that the said sum and residue

Nov. 17, 1830. ' shall be payable by my said trustees at the first term of Whitsunday or Martinmas that shall happen twelve months after my decease, or as soon thereafter as the funds under trust can be realized: Also declaring, as it is hereby specially provided and declared, that neither the said sum and residue, nor any part thereof, shall be diverted at any time from the uses and purposes for which the same is hereby destined, or applied to any other use or purpose whatever; and the said magistrates and town council, and clergymen, shall lend out the free balance of the interest and profits arising from the said sum and residue every year, on such heritable or personal security as they may deem sufficient at the time, so as the same may accumulate, with the additional interest arising thereon, until the principal sums, and accumulated interests, shall amount to the sum of £. , sterling, when the same shall be stocked, secured, and employed upon lands, bonds, obligations, or other sufficient security, from time to time, for erecting and maintaining the foresaid hospital, and for the maintenance, clothing, and education of boys of the description above mentioned: It being always in the power of the managers of the said funds, if they shall continue to increase, to augment the size of the hospital, and number of the boys to be maintained therein, as above mentioned; and they are also hereby empowered to pay such sums of apprentice-fees for the said boys, and for fitting them out after their apprenticeships are expired, as shall from time to time be payable, for these purposes, to boys educated in Robert Gordon's hospital aforesaid.'

Two days thereafter, Mr Ewen died.

Of this deed, and also of the post-nuptial contract executed by her and her husband, the appellant brought an action of reduction, on the ground, 1st. That supposing the discharge was applicable to her rights as heir of provision under the marriage-contract of her father and mother, (which she disputed,) it had been obtained by fraud and deception, and therefore ought to be set aside. 2d. That if it did not import such a discharge, then the deed of settlement was in fraudem of her rights as heir of provision. 3d. That as the deed of settlement contained blanks in essentialibus, it was an incomplete deed, so that her father had died intestate, and she was entitled to succeed to him as his heir at law and next of kin. And, 4th. That as the deed of settlement was executed upon death-bed, her rights as heir of provision could not be affected by it, and that a discharge by an heir of a right to reduce a death-bed deed was inept.

On the other hand, the respondents maintained, 1st. That the

discharge embraced her rights as heir of provision. 2d. That Nov. 17, 1830. the allegations on which the charge of fraud was founded, were not true, and were not relevant. 3d. That the blanks were unimportant, because the deed in other respects afforded sufficient means for effectually carrying it into execution. And, 4th. That although the appellant was no doubt entitled to have the deed reduced as to the heritable property, yet the law of death-bed did not apply to movables, or to the right of an heir of provision to such species of property.

The Court reduced both the discharge and the deed of settlement; but, on a petition by the respondents, while they so far adhered to their interlocutor as to reduce the trust-deed, 'as having been granted in fraudem of Ewen's marriage-contract with Janet Middleton,' they altered their interlocutor 'in so far as it may be construed to extend to the reduction of the marriage-contract entered into betwixt the respondent (appellant) and James Grahame, her husband: And found it unnecessary to reduce the said contract, in respect that the same does not import any discharge of the rights competent to the pursuer (appellant) on the death of her father, as heir of provision, under her father and mother's contract of marriage.'\*

Against this judgment the respondents appealed; and, on the 28th of June, 1825, the House of Lords found that 'the marriage-contract entered into between the respondent and James Grahame, her husband, imports a discharge of all the rights competent to the pursuer as heir of provision under her father's and mother's contract of marriage;' and, therefore, reversed the interlocutors in so far as inconsistent with that finding, and remitted the case back to the Court of Session.†

When the case returned to the Court of Session, decree of reduction on the head of death-bed was (of consent) pronounced as to the heritable property; and the remaining points as to the fraud, the blanks in the trust-deed, and the effect of death-bed in regard to the movables came to be discussed. With reference to these points, the Lord Ordinary found 'That there is no evidence produced in process sufficient to establish that the subscription of the pursuer (appellant) or of her husband to the post-nuptial contract of marriage was obtained by the fraud of her father, the late Mr John Ewen, or that the consideration given by that deed, in return for the pursuer's discharge of her rights under her mother's contract of marriage, was, considering the probable amount of Mr Ewen's fortune at the time, unfair or

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\* 2 Shaw and Dunlop, p. 612.

† Ante I., page 595.



Nov. 17, 1830. 'inadequate: That there is nothing condescended on by the  
 ' pursuer which is relevant to infer such fraud, in opposition to  
 ' the evidence to the contrary already in process: That the dis-  
 ' charge contained in the said deed bars the pursuer from making  
 ' any claim in the character of heir of provision under her  
 ' mother's contract of marriage, and that it is only in the charac-  
 ' ter of her father's heir at law that it can be competent to her to  
 ' challenge his trust-settlement on the head of death-bed, in  
 ' which character her right of challenge is limited to the heri-  
 ' tage: That as these blanks do not occur in that part of the deed  
 ' which gives directions to the trustees, pointing out the uses to  
 ' which they are to apply the trust-funds, they cannot have the  
 ' effect of annulling the trust-conveyance, whatever they may  
 ' have in vacating the bequest to the magistrates and clergy of  
 ' Montrose, for the purpose of erecting and maintaining an hos-  
 ' pital: But, further, That the omission to fill up the said blanks,  
 ' is not sufficient to vacate the said bequest, and that the same  
 ' is notwithstanding effectual.' His Lordship therefore assoil-  
 zied the respondents; and, with reference to the question as to  
 the blanks, issued the subjoined Note.\*

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\* NOTE.—It appears from that part of the trust-deed which is intended to mark out the powers and duties of the managers of the hospital, that the testator had been aware that the funds destined for this purpose might not be sufficient for carrying his object into immediate execution, and that he intended to allow them to accumulate for a certain time. It appears farther, that he intended to limit this accumulation by fixing the sum at which it was to stop; but that, not having made up his mind when the deed was executed, the sum was left blank, and that he died without having had it filled up. The question, and it is one of considerable difficulty, comes therefore to be, whether or not is the uncertainty thereby created, as to the period of the accumulation, and, of course, as to the size and extent of the hospital at its commencement, or the consideration that the testator's intention of fixing these himself, has not been carried into effect, sufficient to render void his declared purpose and object of founding an hospital? The Lord Ordinary thinks it can scarcely be maintained that the testator's failure to complete any direction, however minute and trifling, as to the management of the hospital, which it may appear he had intended to give, can have such an effect. Thus, suppose (to take the cases put by the defenders) that in pointing out the dress to be worn by the boys, he had declared that they were to wear cloth of a colour, or that they were to have a flesh dinner on

days of the week, and that he had died before filling up these blanks, it will not surely be held that such an omission would have totally defeated his main purpose, and carried the funds to his heirs at law. But if this cannot be maintained, then some other criterion must be resorted to, and the Lord Ordinary cannot see any line of distinction but one founded on the importance of the omission. He conceives such blanks will only be fatal which render uncertain either the object and purpose of the bequest, the person in whose favour it is made, or the amount of the sum bequeathed, or, at least, that the direction which was intended to be given, must be of that nature and importance that it is reasonable to presume the testator would not have inclined to leave the legacy unless accompanied by the direction. In the

The appellant reclaimed, but the Court, on the 5th of Feb- Nov. 17, 1830. ruary, 1828, adhered.\*

Mrs Ewen or Grahame then appealed.

*Appellant.*—1. Independent of the allegations as to which no proof has been allowed, there is sufficient evidence from the admitted facts, and what is set forth in the deed itself, to establish that it was obtained by fraud. Under the marriage-contract of her father and mother, valuable rights were secured to the appellant, and which it now appears were worth upwards of L.14,000. These rights she is made to discharge in consideration of L.315, of which one half was not to be payable till after her father's death, and for which no security was given; while the other half was not paid in full, but the amount of a pretended account set off against it, and a promissory-note granted for the balance. Besides, the deed sets forth a falsehood calculated to mislead and deceive the appellant. It states that the payment was made, not in respect of the obligation of which her father was truly seeking a discharge, but 'out of his own free-will, and from the regard 'he bore to his son and daughter.' If this statement were true, and the L.315 was given *animo donandi*, then no consideration whatever was paid to the appellant for the discharge.

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present case, it does not appear to the Lord Ordinary that the blanks in the deed are of that importance. The amount of the legacy to be paid by the trustees is clear and certain; the persons who are to reap the benefit are distinctly specified; and the nature and the quality of the maintenance, clothing, education, and apprentice-fees which they are to receive are fixed by reference to another hospital, to which the new one is, in all these respects, to be similar. Even had the clause as to the extent of the accumulation been altogether omitted, there seems to be direction sufficient to regulate this matter in a previous part of the deed, where the testator directs that the sum bequeathed, with the interest and profits arising from it, shall remain vested in the managers, 'and be laid out and managed by them for the purposes foresaid,' under such rules and regulations as he should afterwards make; or, failing such, under rules similar to those existing for the management of Gordon's Hospital, 'with such 'additions to, or alterations thereon, as may be made by my said trustees, and which 'they are hereby empowered to do.' So that there does not appear to be much necessity for the interference of a Court of Equity to supply the defect. It may be further observed, that the uncertainty of the period of accumulation is reduced within comparatively narrow limits, by the operation of the Act of the 39th and 40th Geo. III. cap. 98, by which such accumulation is restricted to the period of twenty-one years from the time of the testator's death. The blank as to the number of boys seems of little moment, as this fell to be regulated by the ultimate amount of the fund, and the number is allowed by the testator to be afterwards augmented, as the funds may permit.

\* See 6 Shaw and Dunlop, p. 479.

Nov. 17, 1830. And if, on the other hand, it was not true, then the deed was obtained by falsehood and misrepresentation, and so was liable to be set aside.

2. The blanks in the trust-deed are fatal to it, being in *essentialibus*. The grantor had two objects in view—the accumulation of a certain sum of money with the view of founding an hospital, and the specification of the persons who were to enjoy the benefits of that hospital. To give legal effect to these objects, it was necessary to specify the amount of the sum with which the hospital was to be founded, and the number of persons who were to have the benefit of it. Unless this were done, it would be impossible to execute the will. The grantor might either have done it himself, or by means of third parties. In the present case, he had evidently intended to do so himself, because he leaves blanks to be filled up, and confers no power upon any one to fix either the one or the other. The deed, therefore, is incomplete, and being so, the grantor has died without duly executing his will.

3. It is admitted that the deed of settlement was executed upon death-bed, and it is settled law, that no discharge previously granted by the heir can prevent him from challenging the deed on that ground. The question therefore comes to be, whether the appellant is entitled to challenge the deed on the head of death-bed. It is said that this right is confined to heritable property; but this is a mistake. It is competent to an heir of provision, to the effect of maintaining his rights, of whatsoever nature, unaffected by any deed executed on death-bed.

*Respondents.*—1. Both the appellant and her husband were quite capable of judging of the value of their rights when they granted the discharge, and the price paid by Mr Ewen was with reference to the actual state of his circumstances, and, considering the contingent nature of the appellant's rights, perfectly fair. He might have died utterly insolvent, in which case her right would have been worth nothing at all, whereas she got a present payment of L.157, and an obligation for a sum of equal amount. But supposing that there had been an inequality in the bargain, that circumstance is not relevant to set it aside; neither can any weight be put on the introduction of the expressions as to the payment having been made out of Mr Ewen's own free-will, and from regard to the appellant and her husband. That statement was quite consistent with the truth. He was under no obligation to pay them a single fraction, and it depended

entirely upon a contingency whether they could ever derive any Nov. 17, 1830. benefit from the provision under the contract.

2. The blanks in the deed are immaterial, for although the grantor himself has not specified the amount of the capital or the number of boys, he has not left these involved in uncertainty. He has committed them, with the other details, to the discretion of the trustees, and he has specified the mode in which they are to be carried into effect, by declaring that the hospital is to be similar to Robert Gordon's hospital in Aberdeen, and that the same rules that exist in regard to that hospital are to be applied to his hospital; so that, having that model before them, the trustees have sufficient directions as to the money to be expended and the number of boys provided for. Even if the amount had been left uncertain, it would be fixed and ascertained by the statutes 39 and 40 Geo. III. c. 98.

3. The plea on the head of death-bed is totally unfounded. It has been already decided that the appellant has discharged her rights as heir of provision, and therefore she cannot found upon them. But even if she could, the law of death-bed does not apply to movables.

LORD WYNFORD.—My Lords, The father of the appellant made a settlement on his marriage, which contains the following clause:—‘That the residue of his whole subjects, whether heritable or movable, shall belong to his children equally; declaring hereby, that in case the said child or children shall afterwards die in minority, without lawful issue of their bodies, and during the lifetime of the said Janet Middleton, their mother, then the general disposition before written, conceived in her favour, shall revive and return to its full force and effect, and she shall have the entire and free disposal of the whole effects and subjects;’ but in case there is a child which survives her, then all the property which these parties then possessed, or *which might be acquired by him*, previous to his death, was to belong to those children. This instrument left to the settler, perhaps, the power of squandering his property in his lifetime; but whatever he left at his death, whether possessed by him at the time he made the settlement, or subsequently acquired, became the vested property of his child or children. The appellant was his only child, and on the death of her father and mother she became entitled, under this settlement, to all the property of which he died possessed—to what he left behind him. The appellant married James Graham. No settlement was made by these parties at the time of their marriage. About a year after their marriage they were about to proceed to London; at ten o'clock of the night preceding their departure, when they were on the point of leaving their country and all that was dear to them, perhaps for ever,—when, in addition to the anguish that such a separation must occasion, they must have been agitated by the hopes and fears that the

Nov. 17, 1830. journey they were about to undertake could not fail to excite,—the deed to which I am about to call your Lordships' attention was for the first time presented to them by Ewen, the father, for execution. The parties, considering that the said James Grahame and Elizabeth Grahame, alias Ewen, his spouse, were lawfully married to each other upon the day of November 1787, and have lived together since that time as married persons, and that now a son is born, lawfully procreated of the said marriage, called John, and also considering that there was no contract of marriage entered into between them prior to the celebration of the marriage, and the said James Grahame intending soon to go abroad, where he may remain for some time in the prosecution of his affairs, he is desirous to make some suitable provision for his said spouse and family, according to his ability; and in like manner, the said John Ewen, out of his own free-will, and from the regard he bears to his said son and daughter, the parties have, with mutual advice and consent, concerted and settled upon the post-nuptial contract underwritten; therefore, in pursuance thereof, the said\* *John Ewen hath instantly, at the making thereof, satisfied and paid to the said James Grahame, the sum of L.157, 10s., as one moiety of L.315 sterling, which he has agreed to give in name of tocher or dowery with his said daughter, of which moiety the said James Grahame and his said spouse hereby grant the receipt, and discharge the said John Ewen, his heirs, executors, and successors, thereof, renouncing the exception of not numerated money, and all other exceptions and objections on the contrary. And sicklike, the said John Ewen binds and obliges him and his foresaids to satisfy and pay to the said James Grahame, his heirs, executors, or assignees, the remaining moiety or half of the said tocher, being the like sum of L.157, 10s. sterling, and that at the first term of Whitsunday or Martinmas next, and immediately following, year and day after the decease of the said John Ewen, with a fifth part more of liquidate penalty, in case of failure, and the annual-rent of the said moiety during the not payment, after the term of payment thereof, above-written; and which whole sum of L.315 sterling is hereby declared to be in full satisfaction to the said Mrs Elizabeth Grahame, alias Ewen, and her said husband, and they do hereby accept of the same in full contentation to them of all goods; and so on. If this instrument is to be permitted to stand, it gets rid of the settlement made on the marriage of the appellant's mother, and gives to her father the power of disposing of his property as he thought proper at his death. If this deed be a fraudulent deed, it is void, and all the rights secured to the appellant by the settlement on her mother, remain to her. Fraud is matter of fact, and proper to be submitted to a jury; but that transaction took place so long ago, that all the persons who could depone to any facts that would be proper for the consideration of a jury in trying a question of fraud, must be in their graves, or their recollection must now be so imperfect, that their evidence would not be*

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\* The passages in italics underscored by his Lordship.

worthy attention. Besides, if fraud be apparent, Courts of Equity (and Nov. 17, 1830. the Court of Session, and your Lordships reviewing the decisions of the Court of Session, are Courts of Equity) will set aside or dismiss fraudulent deeds, without referring them to a jury. I humbly submit to your Lordships, that it appears from these deeds, and from facts which cannot be disputed, that old Ewen took advantage of his influence over his daughter, and of the situation of her husband at the time that deed was executed, and fraudulently obtained from them a renunciation of the right that was secured to his daughter by the settlement. The appellant, who was only just twenty-one years of age, gave up a reversionary right to prospects amounting to L.14,000. For what? For L.315; half, as the deed falsely states, paid at the time of the execution of the deed, and an engagement to pay the remainder at Whitsuntide, or Martinmas, after one year and a day after Ewen's death. Now, as to the moiety that was to be paid after Ewen's death, the appellant was not in a better situation under this deed than she was under the settlement. If Ewen left money to that amount behind him, the appellant would have taken it under the settlement. If he did not die worth so much, she could not obtain it under the deed, for that deed gave her no other security than what she had under the settlement. If any property had been pledged as a security for the payment of this L.157, 10s. such a pledge might have been regarded as a consideration for the relinquishment of the chance of what the appellant might succeed to on her father's death under the settlement. As no additional security is provided by this deed, it must be taken that she relinquished her right for the L.157, 10s. said by the deed to be actually paid at the time of its execution. But this allegation of the deed is false; for instead of L.157 being then paid in money, no money whatever passed. Instead of the payment of money, a pretended claim of L.61 for goods furnished to these young persons was discharged, and a promissory-note was given by the father to his daughter for the payment of L.96, that being the remainder of L.157, 10s., declared by the deed to have been paid. Courts of justice consider false allegations in deeds as strong proof of fraud. In fair transactions there is no occasion to resort to falsehood—that is only done when the real facts will not bear the light. It should be observed also, that no account of the goods, for which L.61 was charged, was ever furnished. The appellant and her husband relied on old Ewen's statement, that a sum was due for goods, without knowing at what prices the particular goods furnished had been charged to them. But it has been said, that although the father died worth L.14,000, he was only worth, at the time of the execution of this deed, L.400. Was L.61 worth of goods, and a promissory-note for L.96, a sufficient consideration for the appellant giving up her reversionary interest on L.400, and what more her father, by his industry, might add to his fortune? But all the circumstances of this case show, that the appellant had no opportunity given to her of considering whether it was a prudent bargain for her to make or not; that advantage was taken of the situation which she and her husband were in at the time the deed was execu-

Nov. 17, 1830. ted, and of their want of the means of raising money for their intended voyage. I shall advise your Lordships to reduce this deed. If this deed be reduced, then the marriage settlement remains in force, and old Ewen had nothing to dispose of, and all the property that he left at his death belongs to the appellant.

I think, however, that the deed of October 1821 is void for uncertainty, and that the property which by that deed Ewen attempted to give for the support of a charity which he intended to establish, did not pass to the trustees appointed by that deed, and would therefore become the property of his daughter, the appellant, as his only child. After making some trifling provision for some members of his family, the deed contains these words:—5thly, For payment to the magistrates and town council of the town of Montrose, the place of my nativity, and the ministers or clergymen of that town, of whatever sect or denomination of Christians they may be, or to any one or more of their number who may be appointed by them, the said magistrates and council, and clergymen, to receive the same, of the sum of L.6000 sterling, for the foundation and establishment of an hospital in Montrose, similar to Robert Gordon's hospital in Aberdeen, for the maintenance, clothing, and education of the lawful sons and grandsons of decayed and indigent burgesses of guild, and craftsmen burgesses of the said town of Montrose; and which sum, and interest and profits arising therefrom, shall remain vested in the said magistrates and town council, and clergymen, and be laid out or managed by them for the purposes aforesaid, under such rules, regulations, and directions as I shall establish and appoint by any separate deed or writing under my hand—he did not make any such deed;—and failing such deed or writing, under rules and regulations similar to those now existing for the government and management of Robert Gordon's hospital in Aberdeen, aforesaid; and with such additions to, or alterations thereon, as may be made by my said trustees, and which they are hereby empowered to do. And, with respect to the rest, remainder, and residue of my means, property, and estate, including, as a part thereof, the aforesaid legacy to the said Baron Grahame, my grandson, in the event of his death, before his receiving the same, and also the sums to be secured and set apart by my said trustees for answering and paying the aforesaid annuities to my said daughter and the said Elizabeth Wallace, after the said annuities shall cease and determine, and be no longer payable, I hereby will, direct, and appoint such residue and remainder to be paid or conveyed and made over by my said trustees to the said magistrates and town council and clergymen of Montrose, or to any one or more of their number authorized by them to receive the same, as an addition to, and to be employed for the same ends and purposes with the *foresaid* legacy of L.6000; declaring, that the said sum (that is the L.6000) and residue shall be payable by my said trustees at the first terms of Whitsunday or Martinmas that shall happen twelve months after my decease, or as soon thereafter as the funds under trust can be realized: Also declaring, as it is hereby specially provided and declared, that neither the said sum (that is the L.6000) and residue, nor any part thereof, shall

' be diverted at any time from the uses and purposes for which the same is Nov. 17, 1830  
 ' hereby destined, or applied to any other use or purpose whatever; and  
 ' the said magistrates and town council, and clergymen, shall lend out  
 ' the free balance of the interest and profits arising from the said sum (that  
 ' is the L.6000) and residue, every year, on such heritable or personal  
 ' security as they may deem sufficient at the time, so as the same may  
 ' accumulate, with the additional interest arising thereon, until the principal  
 ' sums and accumulated interests shall amount to the sum of L.  
 ' sterling.' Therefore, your Lordships will perceive that the L.6000, and  
 the L. , is to be put out, in the manner directed, to raise interest  
 upon it, and that that interest is to go on accumulating till it amounts to  
 the sum of pounds blank; and till it has amounted to the sum of pounds  
 blank, the trustees can build no hospital, and they can do no act what-  
 ever in the execution of this trust. Now, my Lords, when does it amount  
 to the sum of pounds blank? No human being can possibly tell. If your  
 Lordships cannot give some meaning to the blank, it is a trust which cannot  
 by possibility be executed. But, my Lords, let us go on with the rest  
 of the deed. ' When the same shall be stocked, secured, and employ-  
 ' ed'—(when what shall be stocked, secured, and employed?)—when  
 the same pounds blank ' shall be stocked, secured, and employed upon  
 ' lands, bonds, obligations, or other sufficient security, from time to time,  
 ' for erecting and maintaining the foressaid hospital, and for the main-  
 ' tenance, clothing, and education of boys.' How many boys? One?  
 one hundred? or one thousand? The sums constituting the provision  
 are uncertain, and the objects to be provided are equally uncertain.  
 Now, my Lords, although, undoubtedly, supposing these sums were cer-  
 tain, and supposing the objects to be provided for were certain, the rules  
 and regulations themselves are sufficiently provided for, yet those rules  
 and regulations can never be called into existence, till you get rid of the  
 other difficulty; till you can make that certain which is left so uncertain  
 in the deed. I agree with one of the learned judges in the Court of  
 Session, that ambiguity will not render a deed void, unless it be such  
 that no construction can be put on it. I also think, that although one  
 part of the deed be quite unintelligible, the other parts of the deed may  
 be good. But how can any part be carried in effect, when nothing is to  
 be done in execution of the trust until a sum is raised which is nowhere  
 specified; and no authority is given to any one to determine what is to  
 be the amount of that sum which is to be realized before any thing is  
 done? My Lords, we have been referred upon this subject to one case,  
 and to one only. That case was decided by your Lordships' House,  
 when you were assisted by a learned judge, whose decease we all lament  
 —I mean that excellent man, the late Lord Gifford. I entirely subscribe  
 to every syllable said by Lord Gifford on that case. It was the case  
 of Hill and Others, appellants, v. Burns and Others, respondents.  
 ' Alexander Hood, of the Island of Mountserrat, after bequeathing cer-  
 ' tain legacies, conveyed the residue of the estate, real and personal,  
 ' amounting to about L.30,000, to his sister, Mary Hood, of Glasgow,  
 ' and her heirs, for ever. Thereafter, she executed a trust-settlement in



Nov. 17, 1830. 'favour of the respondents, as trustees, in which, after leaving legacies 'to different individuals, she appointed the residue of her estate,'—the residue as it existed at that time, which makes a great distinction between that case and the present,—'to be applied to charitable purposes, in these 'words: "I appoint the residue of my said estate to be applied by my said 'trustees and their aforesaida, in aid of the institutions for charitable and 'benevolent purposes, established, or to be established in the city of 'Glasgow, or neighbourhood thereof, and that in such way or manner, 'and in such proportions *of the principal or capital, or of the interest or 'annual proceeds of the sums so to be appropriated, as to my said trustees, 'and their aforesaida, shall seem proper: Declaring, and I hereby expressly declare, that they shall be the sole judges of the appropriation of 'the said residue for the purposes aforesaid."*' My Lords, what was the question in that case? It was said, it is necessary for this lady distinctly to state who are the objects of her bounty. Lord Gifford answered, No; it is not necessary for this lady distinctly to state who are the objects of her bounty. She says it is in aid of all the charitable institutions existing, or which hereafter are to exist; and in order that there may be no uncertainty as to what charitable institutions now exist, or as to what may hereafter exist, it was left to her trustees to say who were to be the objects of her bounty. Now, your Lordships perceive, that in that case, there is not the uncertainty which there is in the present. There the extent of the fund given was ascertained, for it was what the deed expressed; and the mode in which that fund was to be managed, was left to the discretion of the trustees. In the judgment in that case, Lord Gifford goes into a learned argument, and refers to a vast number of cases, (which I will not trouble your Lordships with reciting,) every one of which stands upon the same principle as that case which Lord Gifford decided, namely, that there was a certain fund, and that the ambiguity as to the appropriation was got over by the discretion vested in the trustees."

Now, no discretion is vested in the trustees here. If it had been said in this deed, 'the trustees shall begin to build as soon as they shall have accumulated such a fund as they think equal to the purpose I have in view,' that would have obviated the difficulty; because then the time when the hospital was to be built would be left to their discretion. But there is no such discretion left with them, or with any body else; and it is quite uncertain what the testator's own intention was upon the subject.

My Lords, under these circumstances, it is with regret that I feel it my duty to advise your Lordships to reverse the decision of the Court below, for which I have the greatest respect, but I must conscientiously exercise my own opinion. I have done so in this case; and after having given to it the most attentive and anxious consideration, I feel myself bound to recommend to your Lordships to reverse the decision of the Court below; and to declare that both these deeds should be reduced.

The House of Lords accordingly reversed the interlocutors complained of, and reduced the deeds.

18th Feb., 1669 (4058.) Leiper, 9th July, 1622. (1 Shaw and Dunlop, p. 552.) Nov. 17, 1830.  
3 Ersk. 8. 99. 3 Ersk. 9. 16. 4 Stair, 20. 37. 3 Ersk. 8. 97 and 98.

J. BUTT—A. M'CRAE—Solicitors.

JOHN M'TAGGART and OTHERS, (Executors of M'TAGGART,) No. 42.  
Appellants.—*John Campbell—J. Wilson.*

WILLIAM JEFFREY, (M'KERLIE'S Trustee,) Respondent.—  
*Lushington—Robertson.*

*Discharge.*—Held (reversing the judgment of the Court of Session) that a discharge 'of all and sundry claims and demands, debts, and sums of money indebted and owing,' did not include a right of relief from a cautionary obligation existing prior to the date of the discharge, but on which the cautioner had not then been distressed;—there having been executed unico contentu with the discharge, a disposition in security to the cautioner of whatever sums of money, principal, interest, and expenses, he might advance and pay in consequence of 'any 'cautionary obligations, letter of guarantee, or other such obligations granted, 'or that may be granted.'

*Process.*—Held (reversing the judgment of the Court of Session) that under the A.S. 12th November 1825, it is imperative to remit a petition and complaint against the judgment of a trustee on a Bankrupt estate to the Lord Ordinary, where facts require to be investigated.

MR M'TAGGART of Ardwell, merchant in London, had given Nov. 24, 1830. very extensive support—said to have been to the amount of thirty thousand pounds—to the house of M'Kerlie and M'Taggart of Glasgow, the partners of which were his brother-in-law and brother; but that house having failed, these advances were lost. 1st DIVISION.

He also, in 1807, became guarantee for M'Kerlie as an individual to Fermin de Tastet and Co. for L.6000, and to Dennison and Co. to a similar amount.

In 1810 M'Taggart visited M'Kerlie, who was then engaged in a spinning concern at Glasgow, called the Gorbals Spinning Company, and the following arrangement took place:—M'Kerlie executed a disposition, dated 23d August, by which he conveyed 'to and in favour of John M'Taggart, Esq., merchant in 'London; whom failing by decease, without having otherwise 'conveyed or assigned the property hereinafter disposed, then 'to John M'Taggart, jun. Esq., merchant in London, his son, 'and his heirs or disponees, heritably but redeemably, always 'and under reversion, in manner after expressed; in the first 'place, all and whole, &c., all in real security to the said John

Nov. 24, 1830. ' M'Taggart; whom failing as before mentioned, then to the  
 ' said John M'Taggart, jun. his son, and his foresaids, of the  
 ' payment of whatever sums of money, principal, interest, and  
 ' expenses, they, or either of them have advanced, or may  
 ' advance to me, from and after the 25th day of May last; like-  
 ' wise in security of whatever sums of money, principal, inte-  
 ' rest, and expenses, they or either of them may advance and  
 ' pay in consequence of any cautionary obligations, letters of  
 ' guarantee, or other such obligations, granted, or that may be  
 ' granted by them, or either of them, to bankers or others, for  
 ' me, as the same shall be ascertained from time to time by the  
 ' cash accounts to be kept by them for me in their books, and  
 ' the vouchers of debt uplifted or retired by them, the same  
 ' not to exceed in whole the amount of L.20,000 sterling, at  
 ' any time, with all expenses to be disbursed by them in rela-  
 ' tion to the premises, to be ascertained by the oaths of the  
 ' disburseurs, if required, when in life, and by such account alone  
 ' in case of death, in place of all other proof, and the interest  
 ' of these disbursements from the several times of disbursing  
 ' the same.'

At the same time M'Taggart granted to M'Kerlie the follow-  
 ing discharge:—' I, John M'Taggart, Esq., merchant in London,  
 ' do hereby exoner and discharge the late company of M'Kerlie  
 ' and M'Taggart, merchants in Glasgow, and Alexander M'Ker-  
 ' lie, merchant there, my brother-in-law, as a partner of that  
 ' company, and as an individual, of all and sundry claims and  
 ' demands, debts and sums of money, indebted and owing by  
 ' them or him the said Alexander M'Kerlie, to me, upon any  
 ' cause or account whatever, at and preceding the 25th day of  
 ' May last, and of all action and execution competent to me for  
 ' the same.'

Both deeds were drawn by the same agent, and signed before  
 the same witnesses.

M'Taggart died in October thereafter; and in 1811 his ex-  
 ecutors were called upon by Fermin de Tastet, and Dennison  
 and Company, to pay the amount of the sums guaranteed, with  
 interest. The payment was accordingly made. In 1815, the  
 estates of the Gorbals Spinning Company, and of M'Kerlie as  
 an individual, were sequestrated under the bankrupt act, and  
 Jeffrey appointed trustee.

The executors of M'Taggart claimed to be ranked for the  
 amount of the payments made under the guarantees, namely,  
 L.14,974, under deduction of the estimated value of the sub-  
 jects secured. The trustee challenged the security by an action

of reduction, founding on the act 1696, c. 5. The result was a Nov. 24, 1880. remit to an accountant.

Thereafter, before the accountant had reported, the trustee issued the following deliverance :

' The trustee upon the sequestrated estates of the Gorbals  
' Spinning Company, and of Alexander M'Kerlie as an indi-  
' vidual, having considered the claim and affidavit of John  
' M'Taggart, Esq., merchant in London, stating himself to be  
' one of, and acting for the other executors of his father, the  
' late John M'Taggart, merchant there, lodged with the trustee  
' for the purpose of being ranked on the said sequestrated  
' estates, for the sum of L.14,974 8d., arising out of certain  
' alleged payments made to Messrs. de Tastet and Co., and  
' Messrs Joseph Dennison and Co., merchants in London, in  
' consequence of guarantee letters granted by the late Mr John  
' M'Taggart to them, on account of the said Alexander M'Ker-  
' lie, under deduction of L.3,400, being the estimated value of  
' certain heritable subjects in Gorbals or Hutchinsontown,  
' Glasgow, conveyed in security to the late Mr John M'Tag-  
' gart by the said Alexander M'Kerlie, on the 23d August  
' 1810; and that although the trustee, in a note issued by  
' him on the 8th May last, called on the claimant to pro-  
' duce the guarantee letters alleged to have been granted by  
' the late Mr John M'Taggart to Joseph Dennison and Co.,  
' merchants in London, and the original accounts and relative  
' vouchers instructing the claim, and to give such further  
' explanations as might be necessary, on or before the 1st June  
' last, the claimant has in answer to that note, of this date, re-  
' fused to produce either the letters of guarantee to Dennison  
' and Co., or the original accounts, and the vouchers which  
' ought to be in his hands; and taking into view all the circum-  
' stances of this case, particularly the terms of the discharge  
' granted by the late John M'Taggart to the said Alexander  
' M'Kerlie, of this date, (23d August, 1810,) wherein he "dis-  
' charged the late company of M'Kerlie and M'Taggart, mer-  
' chants in Glasgow, and also Alexander M'Kerlie, merchant  
' there, my brother-in-law, as a partner of that company, and  
' as an individual, of all and sundry claims and demands,  
' debts and sums of money, indebted and owing by them or  
' him, the said Alexander M'Kerlie, to me, upon any cause  
' or account whatever, at and preceding the 25th day of  
' May last, and of all action and execution competent to me  
' for the same. In witness, &c.;" and further taking into view  
' that the late John M'Taggart was in Scotland at the date of

Nov. 24, 1830. ' executing this discharge, and perfectly aware that the principal sums of L.6000 each, guaranteed by him to the said Messrs de Tastet and Co., and Joseph Dennison and Co., forming the present claim, had been due to these companies for several years preceding the date of the discharge, and that it appears to the trustee to have been the evident intention of the late Mr Mac-Taggart to relieve the said Alexander M'Kerlie of these two claims, at the date of granting the discharge, from its broad and unqualified terms; and having advised with the commissioners on the sequestrated estates, finds, 1mo, That the claimant was bound to have produced the original or authenticated copies of these accounts of Joseph Dennison and Co., and the relative vouchers instructing the same; finds, 2do, That it is admitted by the claimant that the debt due by M'Kerlie to De Tastet and Co., on the 31st December, 1809, was L.6923, and that it was a debt truly due at that date by the late Mr M'Taggart, under his guarantee obligation for Mr M'Kerlie, and that De Tastet and Co. looked to him alone for payment. That the claimant does not deny that the debt due to Joseph Dennison and Co. was in a similar situation at that date, and that both debts continued without any material diminution down to 23d August, 1810, the date when the heritable security was granted, and remained in nearly the same situation until 1811, when they were paid by the present claimant; finds, 3tio, That at the date of the said discharge by Mr M'Taggart to Mr M'Kerlie, there was no other debt or claim by the former against Mr M'Kerlie as an individual, but the debt arising out of the credit obtained by Mr M'Kerlie in consequence of the said guarantee letters; and that the parties to the said discharge appear to have had it in view, by the broad and unqualified terms of that discharge, and by the manner in which the grantor of it, while he lived, and his executors subsequently, treated the debts for which the claim is now made, by making no claim or demand whatever against Mr M'Kerlie until after his sequestration, 14th September, 1815, although a period of upwards of four years, with respect to the debt due to De Tastet and Co., and of three years and eleven months, with regard to the debt due to Dennison and Company, was allowed to elapse before it appears that any direct claim was made against Mr M'Kerlie, during all which time Mr M'Kerlie continued to conduct his business in the ordinary way; from which it appears that it was the intention of the late Mr M'Taggart entirely to relieve Mr M'Kerlie of these debts, to confine the security granted over Mr M'Kerlie's

' heritable subjects to debts subsequently to be contracted, and Nov. 24, 1830.  
 ' to his relief of any subsequent obligations which he might  
 ' grant for Mr M'Kerlie ; therefore, and upon the whole, the trustee, with advice as foresaid, rejects in toto the above claim.'

The Executors then presented a petition and complaint to the Court of Session, praying the Court, *inter alia*, to alter the deliverance, find them to be just and true creditors of M'Kerlie; ' or to give the petitioners such other relief in the premises ' as to your Lordships may seem just.' Answers having been lodged, the petitioner's counsel moved, that in terms of A. S. Nov. 1825, § 25, the case should be remitted to the Lord Ordinary for preparation.

*Lord Gillies*.—There is nothing to remit. The discharge plainly applies to the claim. There can therefore be no use for a remit.

*Lord President*.—The words of the discharge are sufficiently broad to comprehend the obligations to De Tastet, and Dennison and Co.; and therefore I see no necessity for a remit.

The Court accordingly dismissed the petition, but found no expenses.\*

The Executors appealed.

*Appellants*.—1. By statute 6 Geo. IV. c. 120, and by the subsequent act of sederunt, Nov. 1825, it was imperative on the Court of Session to remit the petition and complaint to the Lord Ordinary. The prayer of the petition was sufficiently broad for the purpose; and, at all events, the Court were bound to obey the statute. They have thus shut the door against evidence, without which they had no *termini habiles* to decide upon.

2. The discharge cannot, according to sound construction, and with reference to the circumstances, be held to apply to the cautionary obligations. The fact of M'Taggart taking a security for his relief, shows that he did not intend to discharge M'Kerlie from the consequences of these obligations. It is of no importance that the sums were advanced by De Tastet and Co. and Dennison and Co. to M'Kerlie previous to the discharge. The material fact is, that at the date of the discharge, they had not been paid by M'Taggart. The discharge had reference to

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\* 6 Shaw and Dunlop, p. 641.

Nov. 24, 1830. other debts due to him by M'Kerlie; and it never was the intention of M'Taggart to include the guaranteed sums within the discharge. The respondent only reaches his conclusion by a violation of the recognised rules of interpretation; the rule being, that general words will not discharge a clause of relief. Besides, while he now alleges that the guaranteed debts were discharged on the 23d August, 1810, he is maintaining in the reduction, that the security granted on the same day was for future advances, and so liable to the operation of the act 1696, c. 5.

*Respondent.*—1. Neither the statute nor act of sederunt are imperative. Indeed this matter is regulated by the bankrupt statute, 54 Geo. III. c. 137; authorizing the Court to decide cases of the present character 'summarily.' Besides, there is no prayer for a remit; and the appellants have never lodged the accounts or documents, so that there was nothing which could be laid before, or received by, the Lord Ordinary.

*Lord Wynford.*—The nature and import of these accounts and vouchers may be produced, and be of importance if the case goes before the Lord Ordinary. But a remit has been refused, because the release was held to have applied to the claim of debt.

*Lushington.*—Then we shall not dwell longer on the accounts, but proceed to the second question, that of discharge. Now look to the terms of the two deeds, as explained by the circumstances under which they were granted. And recollecting that the appellant, when called in the action of reduction, insisted that the act 1696, c. 5, did not apply, because the money had been advanced at the date of the security; and remembering that at the date of the discharge M'Taggart was aware of the bankruptcy of M'Kerlie, is it possible to deny that the release must have been intended to discharge these guaranteed debts, being debts at that very time incurred by M'Kerlie to De Tastet, and Dennison and Co.?

*Lord Wynford.*—Did the Court proceed on the books and vouchers or not? If they relied on the state of accounts, yet rejected the books, there was no evidence before them; if they had the books and vouchers before them, the case may be different. We must see our way clear. No doubt, if the discharge of itself be so wide as represented, the Court need not have gone into the accounting. But if the terms are not so wide, then the accounting was plainly a matter of enquiry.

*Robertson.*—The Court held from the case before them, and the terms of the discharge, that the question was at once susceptible of a decision. It was a summary matter. Sending the

case to the Ordinary that accounts might be examined into, was Nov. 24, 1830. losing time and incurring unnecessary expense.

*Lord Wynford.*—Still, even if the case were 'summary,' if it were necessary to ascertain facts, the cause should have been remitted to the Lord Ordinary.

*Robertson.*—Certainly, if the Court had any difficulty as to the facts. But they had not. They confined their minds to the discharge.

*LORD WYNFORD.*—My Lords, it has been objected in this case, that the Court of Session ought to have remitted this case to the Lord Ordinary. The Court of Session seem to have been of opinion that there was nothing to remit to the Lord Ordinary. The Lord Ordinary is a Judge both of law and of fact. If there be any matter of fact or law to be decided, in any case, the Court of Session are, I think, bound by their Act of Sederunt, to send such case to the Lord Ordinary. This Court of Session, in matters of bankruptcy, under the 54th Geo. III., proceed summarily; that is to say, there is no personal summons, no condescendence, as in other Courts. But it has been admitted, that if there be any facts to be enquired into, it is usual to send cases of bankruptcy to the Lord Ordinary to enquire into such facts; and if any question of law should be found to arise, to give his opinion on the question of law. The Court of Session should have the assistance of the Lord Ordinary in all cases where any thing is to be decided. This is provided by the Act of Sederunt. That Act of Sederunt is binding on the Court, until it be rescinded by another act of the same authority. If a Court of Justice takes upon itself to dispense with an Act of Sederunt made for the regulation of its practice, the suitors of the Court can never know what the practice of the Court is, and much confusion, delay, and expense will be occasioned. I think, therefore, that as there was matter of fact to be inquired into, this case should have been remitted to the Lord Ordinary.

— This brings me to the main question raised in this case, namely, does a release of debts, due on or before a certain day, discharge a debtor from the repayment of a sum paid by his creditor after that day, in consequence of a security which the creditor had given for his debtor before that day? This question depends on the construction of another instrument. In giving a construction to this instrument, your Lordships will look only at the instrument, and not to any evidence out of the instrument. If the intention of parties to written instruments is not to be collected from the instruments, but from other evidence, the security which written documents are calculated to afford is destroyed. Now, if an instrument speaks of debts due *on a certain day*, it means such as were counted debts on that day. Such as the creditor could on that day have required the payment of from his debtor, and not engagements, which, although they might occasion future claims, give no immediate right of action. This point is decided by the case of *Oliphant v. Newton*, in *Morrison's Dictionary*, 5035. 'A creditor having given a general discharge to his debtor, for whom he was



Nov. 24, 1830. 'then cautioner, but not distressed, it was contended that the general 'discharge,' (and these words are very important,) 'did also cut off the 'relief of the cautioner, seeing that the debtor was in effect bankrupt, 'and had sold his lands to pay his debts, which far exceeded the price, and 'yet here there was no reservation of cautionary in the discharge.' But the Lords found that the general discharge did not extend to cautionary and relief, whereon the grantor was not distressed at the time of the discharge.

*See also Lord*

So in the case of Campbell v. Napier, the Court held that a general discharge was not to be extended to a sum, for which the grantor of the discharge was cautioner, and was charged, unless before the general discharge he had made payment. There is a passage in Mr Erskine precisely to the same effect. That being the law, it is quite clear that the discharge in this case, applying to the instrument the rule of construction of Scotch law, did not discharge this, which afterwards became a debt, but which was not a complete debt at the time. The words are, 'I, John M'Taggart, Esq. merchant in London, do hereby exoner and discharge the late company of M'Kerlie and M'Taggart, merchants in Glasgow, and Alexander M'Kerlie, merchant there, my brother-in-law, as a partner of that company, as an individual, and also as a partner in that firm,' of all and sundry 'claims and demands, debts and sums of money, at and preceding the 25th day of May last.' So that it exonerates from no debt except that which existed 'preceding the 25th day of May last.' Then let us look at the other part of the instrument: 'Mr M'Kerlie sold and disposed to, and in favour of, John M'Taggart, Esq., merchant in London; whom failing by decease, without having otherwise conveyed or assigned the property hereinafter disposed, then to John M'Taggart, junior, Esq., merchant in London, his son, and his heirs or disponees, heritably but redeemably, always and under revision, in manner after expressed; in the first place, all and whole, &c., all in real security to the said John M'Taggart; whom failing, as before mentioned, then to the said John M'Taggart, junior, Esq., and his forebears, of the payment of whatever sums of money, principal, interest, and expenses, they, or either of them have advanced, or may advance to me, from and after the 25th day of May last—the same day to which reference has before been made. It is given in satisfaction of 'whatever sums of money they or either of them have advanced, or may advance, to me, from and after the 25th day of May last; likewise in security of whatever sums of money, principal, interest, and expenses, they or either of them may advance and pay in consequence of any cautionary obligations, letters of guarantee, or other such obligations granted, or that may be granted, by them or either of them, to bankers or others, for me, as the same shall be ascertained from time to time by the cash accounts to be kept by them for me in their books, and the vouchers of debt uplifted, or retired by them, the same not to exceed in whole the sum of L.20,000 sterling.' This does not infringe the construction of the previous release of debts due before the 25th May. It makes a provision for the payment of such as should become

due afterwards, and it contains words which show that the parties did Nov. 24, 1830. not mean that the release should discharge any claims but for debts actually due; for an express provision is made for what M'Taggart might advance and pay in consequence of any cautionary obligations granted, or that might be granted.

I should, therefore, humbly recommend to your Lordships, that this case should be remitted to the Court of Session, with directions to examine into this matter; and that a declaration be introduced into the order of this House, that the House do not consider the release as a discharge of the debt, which was contracted subsequent to the execution of that instrument, by Messrs M'Taggart and Company having been called on to pay L.12,000 after the 25th of May, although the obligation which rendered them liable to the payment was executed before the date of the release.

The House of Lords accordingly ordered and declared,

"That the discharge in the pleadings mentioned, and dated the 23d of August 1810, did not extend to exoner or discharge the house of M'Kerlie and M'Taggart, or the said Alexander M'Kerlie, as an individual, from any monies paid by John M'Taggart, the father, or by his executors, on account of the said house, or of the said Alexander M'Kerlie, subsequent to the date of the said discharge: And it is Ordered and Adjudged, That the said interlocutor complained of in the said Appeal, so far as is necessary to carry the above declaration into effect, be, and the same is hereby reversed; And it is further ordered, That, with this reversal and declaration, the cause be remitted back to the First Division of the said Court of Session, to proceed therein according to the terms of the Statute 6 Geo. IV. cap. 120, and the Act of Sederunt, made in pursuance thereof, and in conformity with this judgment."

*Appellants' Authorities.*—3 Ersk. Inst. 3. 65—4. 9 1 Stair. 18. 2. Mor. Dict. voce "General Discharge." 4 Brown's Supplement, p. 9.

**MONCRIEFF, WEBSTER, and THOMSON—RICHARDSON and CONNELL—Solicitors.**

No. 43. SOCIETY OF SOLICITORS, Edinburgh, Appellants.—*Lushington—Robertson.*

MATHEW SMILLIE and Others, Respondents.  
*John Campbell—Spankie.*

*Exclusive Privilege.*—Held (affirming the judgment of the Court of Session) that the Society of Solicitors before the Sheriff Court of Edinburgh, have no exclusive privilege of practising before the Court of the Sheriff-substitute of Leith.

Nov. 24, 1830. By a statute passed in 1827, relative to the town of Leith, it was enacted :—‘ That it shall and may be lawful for the Sheriff-depute of the county of Edinburgh, and he is hereby specially authorized and required to nominate and appoint, and from time to time thereafter, as any vacancy may occur, or pro tempore if necessary, a fit person, qualified according to law, to be the Sheriff-substitute in and for the said town of Leith, and such districts adjoining thereto, as to the said Sheriff-depute shall seem proper, for the due administration of justice within the same.’ ‘ And be it further enacted, that the said Sheriff-substitute shall be resident within the said town of Leith, and shall keep or hold such daily or regular Courts therein, in the Court-room to be provided for that purpose, in manner after mentioned, as shall be necessary for the full and due administration of justice, both civil and criminal, in the said town of Leith, as fully as it is competent to any Sheriff-substitute elsewhere in Scotland; and the sentences or judgments of the said Sheriff-substitute, as Sheriff-substitute, or as Deputy-Admiral, shall be subject to such and the like review, as the sentences or judgments of any Sheriff-substitute, or Deputy-Admiral, are severally and respectively subject, and liable to by the law and practice of Scotland.’ It was farther declared, that nothing contained in the statute should affect the power of the Sheriff to exercise all the powers competent to him, including those intrusted to his substitute at Leith, nor injure the rights of any other party, but that the statute should not bestow any right or power on any persons or bodies corporate, which they did not already possess, other than those conferred by the statute.

In consequence of this enactment, and upon a recital of it, the Sheriff appointed a substitute for the town of Leith and certain adjacent districts, with power to him to hold Courts. He also, in virtue of his power as Sheriff of the county, appointed the same gentleman to act as his substitute, not only

1st Division.  
Lord Core-house.

for the town of Leith and the above district, but for the whole Nov. 24, 1830. county. In consequence of this appointment a Court was opened at Leith. Previous to this time, the only Courts which had been held there were those of the Admiral and the Bailie of Leith.

By an Act of Sederunt of the Court of Session, relative to inferior Courts, dated 15th November, 1825, it was ordered that 'No person shall be allowed to practise as a procurator, unless he has served three years as an apprentice to a writer to the signet, solicitor before the Supreme Courts, or to a procurator before any Sheriff Court in Scotland, or Court of Royal Burgh, or Sheriff-clerk, be twenty-one years of age, and be regularly admitted by the Sheriff, without prejudice to the legal rights of chartered bodies, and without prejudice to the present regulations of each Sheriff Court on this subject continuing in force for three years from this date.' It was also declared, 'That it shall be competent for any Sheriff-substitute to suggest for the consideration of the Lords of Council and Session, &c. such other or farther regulations for the forms of process in the Sheriff Courts as may appear expedient; such suggested regulations being transmitted for that purpose to the senior Principal Clerk of Session.' At this time the Leith Court was not in contemplation.

On the institution of this Court, the respondents, Mathew Smillie, Alexander Ross, John Harvie, and Alexander Simpson, writers and practitioners before the Admiralty and Bailie Courts of Leith, presented petitions to the Sheriff, praying that he would admit them as 'ordinary procurators in the Court of the Sheriff-substitute of Leith, within the bounds of his jurisdiction.' The Sheriff appointed this application to be notified to the incorporated Society of Solicitors before the Commissary, Sheriff, and City Courts of Edinburgh, that they might be heard for their interest, and ordained the above parties to lodge a condescendence, showing their qualifications in terms of the Act of Sederunt. This order was, at their request, recalled, as they admitted that they did not possess the qualifications there mentioned; but they submitted that, in terms of a provision in that Act, and as the institution of this new Court was casus improvisus, the Sheriff should suggest to the Court of Session the propriety of dispensing with the specific qualifications there required; and as they were duly qualified in point of skill, that they should be admitted to practise before the new Court. This motion was in the meanwhile superseded, and answers were lodged by the Society

Nov. 24, 1830. of Solicitors, who objected, that if the petition were granted, it would be an encroachment on their exclusive privileges. In support of these privileges they stated, that in 1707 they had been constituted a Society by articles of agreement, which were confirmed by the Commissaries of Edinburgh in the same year;—that in March 1765, the Magistrates of Edinburgh had granted to them a Seal of Cause, conferring on them ‘the sole and exclusive privilege of exercising the office or business of procurators before all the Courts held by the Magistrates of Edinburgh, in all time coming;’ that in the same year the Sheriff of the county had, upon their application, passed an Act of Sederunt, ordaining that, before any person could be admitted as a procurator, he must have served an apprenticeship with one of their body; and that, on the 12th of April 1780, they had obtained a Royal Charter, proceeding on the narrative of these rights, constituting them an incorporation ‘per nomen et titulum Societatis Solicitorum coram Commissarii Vicecomitis et Civitatis Curiis Edinburgi,’ and containing a clause in these terms:—  
 ‘Et ulterius, nos volumus et declaramus, quod nemo jus habebit aut instructus erit causas agere et exercere coram Commissarii Vicecomitis et Civitatis Curiis Edinburgi, vel sociis fieri dictæ Societatis et corporationis, nisi talis persona prius regularum indenturam inserviverit pro tribus annis cum uno ex sociis corporationis, attenderit illas curias tanquam clericus pro tribus annis alterius post expirationem talis indenturæ, et attenderit Collegium legum Scotiæ pro uno anno, et subiverit privatam examinationem coram Societate, ac etiam publicam examinationem in forma nunc usitata de ejus notitia stolorum, forma processuum et principium legum Scotiæ, tali persona semper existente bonæ famæ et deportationis, solvente feoda admissionis tunc usualia et præstabilia, tabilia et contribuyente ad fundos dict. corporationis cum aliis sociis. Declarando quod nihil in præsentibus intelligitur vel intenditur derogare ab, impugnare vel afficere privilegia Juridicæ Facultatis.’  
 They farther stated, that in virtue of the ratification of the Commissaries—the Seal of Cause of the Magistrates—the Act of Sederunt of the Sheriff, and the Royal Charter, they had enjoyed the exclusive right of practising before these respective Courts.

To this it was answered: 1st, That although the Court established at Leith was called a Sheriff Court, and was placed under the jurisdiction of the Sheriff of the county, yet it was a new Court created and established by the Legislature, to which, therefore, the exclusive privileges of the Society could

not extend; and 2d, That even if it had not been a new Court, Nov. 24, 1830. the privileges of the Society were confined to the Court held by the Sheriff within the city of Edinburgh, and did not extend to Courts held by him or his substitutes in other parts of the county.

The Sheriff pronounced this interlocutor:— ‘ The Sheriff having resumed consideration of this process; In respect that all rights of monopoly or exclusive privilege ought to be strictly interpreted; and in respect that the expressions, “ the Commissary, Sheriff, and City Courts,” used in the Crown Charter 1780, appear only to apply to the Courts then existing, and held in Edinburgh; and that, at the dates of the Act of Court, 16th May 1765, and of the Crown Charter 1780, the Sheriff Court held in Edinburgh was the only Sheriff Court for the county; Finds, that the right conferred on the Society of Solicitors-at-Law, by the Act of the Sheriff Court, 16th May 1765, and the Crown Charter 1780, must be held restricted to the Sheriff Court then constituted and held in Edinburgh, and cannot be extended to the right of practising in a Court not then in existence, or held in any other place of the county of Edinburgh: Therefore, Repels the defences founded by the Society of Solicitors-at-Law, on the Act of Court 1765, and the Charter 1680: Finds, that the petitioners are not qualified, in terms of the Act of Sederunt, November 1825, to be admitted to practise in the Sheriff Court: And supersedes for six weeks consideration of the expediency of the Sheriff, in terms of the last section of the Act of Sederunt, submitting for consideration of the Court of Session any suggestion in favour of the petitioners, in order that the respondents may, in the mean time, have an opportunity of taking such legal steps as they may think necessary for having the legal rights for which they contend established in a competent form.’ The Sheriff at the same time issued the subjoined note.\*

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\* ‘ I am of opinion, that the expressions, “ Commissary, Sheriff, and City Courts of Edinburgh,” only apply to the Courts held in Edinburgh. No other construction is applicable to the City Court. It is unreasonable to suppose that the same word, Edinburgh, can have a broader construction, in reference to the Sheriff Court, so as to comprehend the whole county of Edinburgh, and the construction of the word, as applying either to the city or to the county of Edinburgh, is inapplicable to the Court of the Commissaries of Edinburgh, the jurisdiction of which extends over the whole of Scotland. If the Commissaries were to hold a court in Glasgow, pro re nata, could the respondents plead that they are the only procurators entitled to practise before the Court thus held in Glasgow? Every legal practitioner must reside, or have chambers, within the bounds of the jurisdiction within which he practises, so that he may easily be made amenable to the orders of

Nov. 24, 1830. The Society having brought an Advocation, and the Lord Ordinary having reported the case, the Court, on the 4th December 1828, repelled the Reasons of Advocation; remitted it simpliciter, and found expenses due.\* Thereafter the Court,

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the Court. On this ground, no person can be admitted a procurator in the Leith Court, unless he be either residing, or his chambers be within, the jurisdiction of that Court. With regard to what is stated in page 51, and subsequent pages of the duplies, I have to observe, that any appeals from the interlocutors of Mr Mathieson in Leith district cases, must be entered in the Leith Court, and the process then sent to me; and that my interlocutor will be entered in the books of the Leith Court, and not in the books of the Edinburgh Court; and the whole proceedings, even after appeal, will be carried on by the Leith practitioners.'

\* 'The following notes of the speeches of the Judges were laid before the House of Lords:

'*Lord President.* I would remark, that the Act of Parliament does not speak of the Courts of the Sheriff of Edinburgh, but the Sheriff Courts of Edinburgh, which is a very different phrase.

'*Lord Balgray.* I think the Sheriff, by his interlocutor, has put the matter on the proper footing; without deciding on the petitions presented by the respondents, he reserves to himself to apply to this Court for instructions.

'*Lord President.* It is said some of these gentlemen may go down and settle in Leith; but they have not yet done so, nor do we know that they will do so; and, in the meantime, are the people of Leith to have nobody to conduct their causes?

'*Dean of Faculty.* I beg your Lordships' attention to the terms of the Charter. You will find the clause on page 8. (Read the clause beginning at *ulteriora*.) The terms of the Charter are plainly the Courts of the Sheriff.

'*Lord Balgray.* Suppose the clause was as broad as the Dean of Faculty would make it, it never could deprive the Sheriff, and it never could deprive this Court, of the right to make regulations, such regulations as may be necessary for the lieges. Let the interpretation of the Charter be as broad as it will, it could not deprive this Court of the power of making regulations for the due administration of justice.

'Suppose the Sheriff found it necessary to hold a court at Portobello, he has power to do so; but suppose he found that necessary from the increase of that village, it is true, that all the procurators would be entitled to practise there; but still, if resident procurators were necessary, this Court might make regulations regarding these.

'My brother, Lord Craigie, will remember, that the Sheriff of Dumfries used to hold his Court occasionally at Lochmaben, and he went to the Court there attended by all the procurators from Dumfries. In the same way, all the procurators might go in the train of Mr Mathieson to his Court at Portobello. But if it turns out that the public are not supplied, is it not in the power of the Sheriff, and is it not the duty of your Lordships, to appoint procurators? I think, in this case, the Sheriff has put the matter just where it should be.

'*Lord Craigie.* I rather think that, before giving any judgment on the rights of the parties, the Sheriff should have come to this Court for instructions.

'In regard to the case of the Sheriff of Dumfries, alluded to by my brother, it was, no doubt, the practice of the Sheriff to hold a Court at Lochmaben, and he was attended there by the procurators from Dumfries, but, what was worse, the expense was put upon the poor litigants. This was complained of, and I at last suppressed the Court at Lochmaben altogether.

'This is a case, however, somewhat different from that of Lochmaben; for there is not merely a Sheriff Court held at Leith, but the Government has expressly en-

on the suggestion of the Sheriff, so far modified the Act of Nov. 24, 1830. Sederunt, as to authorize the Sheriff to admit the respondents as procurators before the Sheriff Court of Leith.

The Society appealed.\*

*Appellants.* 1. At the time when the respondents presented their petition to the Sheriff, they had no legal title to maintain the prayer of it. They admit that they had not the qualification required by the Act of Sederunt, and the subsequent modification of that act, and the admission of the respondents, cannot affect the right of the appellants to object to the title of the respondents. Their petitions, therefore, ought to have been dismissed.

2. The judgments are ultra petita. The only question which was raised by the petition of the respondents, was, whether they were entitled to be admitted as practitioners before the Leith Court. But the Courts below have decided a point which was not before them, by finding that the exclusive privileges of the appellants are confined to the Courts in the city of Edinburgh.

3. The judgments proceed on a misconstruction of the terms of the charter. It is quite clear that it was the meaning and intention of that deed to confer upon the appellants the exclusive right of practising before the Sheriff, and in order to enjoy this privilege, they are required to possess certain qualifications. It never could be meant, that if the Sheriff were to hold his Court out of Edinburgh, that any person, whether qualified or not, might practise before him. But it is said that the Court at Leith is a new Court. In one sense it is so; but it is a Court of which the Sheriff is the head; and, if the appellants be right in their construction of the charter, that they have the exclusive right of practising before the Sheriff, then they must also have that right in regard to the Court in question.

The counsel for the respondents were stopped.

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abled and required the Sheriff to do so, in consequence of the size, importance, and population of the place, and I think it necessary that there should be procurators there to conduct the business of the Court.'

\* The Lord Chancellor Brougham, before counsel were heard in this case, stated that, as he had been consulted when at the bar for the appellants, he would rather decline hearing the cause; but at the request of the respondents, and by consent of parties, his Lordship heard it.



Nov. 24, 1830. **LORD CHANCELLOR.**—My Lords, in this cause, if I had entertained any thing like a reasonable doubt of the soundness of the judgment of the Sheriff, and of the Court of Session, I should not have advised your Lordships to decide, without hearing the counsel of the respondents; but, after having given my individual attention to the cause—to the powerful arguments of the appellants' counsel—after having carefully considered the facts which are not disputed, and referred to the several instruments, viz. the regulations of the Commissaries—the Seal of Cause of the City of Edinburgh, of 6th March 1765—the Act of Court of the Sheriff-depute of the county of Edinburgh, of the 16th May 1765—the Royal Charter of 1780, and the Act of Parliament of 7th and 8th Geo. IV.—I entertain no doubt whatever, that the Court have come to a right decision, in repelling the reasons of advocacy, and remitting to the Sheriff. Your Lordships, sitting in the highest judicature, will always be anxious to set the salutary example of avoiding, in any particular case, to deal with questions which do not present themselves as necessary for the decision of that case. This measure of judicial reserve is the more needful, in proportion to the importance of the questions which are thus unnecessarily offered to the Court; but if there be any question to which this rule ought to be with peculiar strictness applied, it is where matters of great general and constitutional import, such as the rights and prerogatives of the crown, are involved. If, indeed, the interests of the subjects of the crown could not be well adjudged without going into the discussion of those high questions, your Lordships must, no doubt, of necessity, go into the enquiry; but it must always be inexpedient to do so, where the necessity does not exist. It is extremely satisfactory to me, that, in affirming the interlocutors complained of, I do not find it necessary here, any more than the learned Judges below deemed it requisite, to raise the point, how far the crown could, by law, grant the exclusive right in question. To enable the appellants to prevail, they must satisfy your Lordships of the truth of both the propositions maintained by them, first, That by the Act of the Commissaries, the Seal of Cause of the Magistrates of Edinburgh (which would, indeed, only give them the right to sue and be sued), the Act of Sederunt of the Sheriff-depute, or the Crown Charter of 1780—that by all of these instruments together, or by long usage, with or without those authorities, there is something, I will not call it monopoly (though the case cited from Viner would plainly authorize the appellation), but some kind of exclusive right conferred on them to practise in the Courts to which the instruments refer, and an exclusive right of a large and indeed peculiar nature; for it is not only to be applied to Courts existing at that time, which it ought to be, but to new Courts to be created in future times. But, secondly, after the appellants shall have satisfied your Lordships of the legal existence of this exclusive right, they must go a step farther, and show your Lordships that the right extends to the Court of the Sheriff-substitute at Leith; unless they can take this step (and it is the one in which your Lordships will find most difficulty in following them), they will in vain have demonstrated the legality of

the general claim. My Lords, it is contended on the one side, that the Nov. 24, 1830. power given under the words of the charter,—‘*Et ulterius, nos volumus et declaramus, quod nemo jus habebit aut instructus erit causas agere et exercere coram Commissarii Vicecomitatus et Civitatis Curis Edinburgi,*’—mean an exclusive power to practise before the Commissary Courts, City Courts, and Sheriff Courts of Edinburgh. On the other hand, it is contended, that it gives exclusive power to practise in those Courts at Edinburgh, in Courts at or in Edinburgh; and this translation is borne out by the Act of the Sheriff-depute of Edinburgh in 1765, in which the words are—‘before the Sheriff Court of Edinburgh.’ I am satisfied that the right construction is, the Commissary Courts, City Courts, and Sheriff Courts of, or at Edinburgh, and not the Courts of the Commissary, City and Sheriff of Edinburgh: but, even without this, there are sufficient grounds to satisfy my mind, that the power, whether legally or not given by charter, does not extend beyond this limit. A remark has been made at the Bar upon the Latin construction of the genitive case ‘*Edinburgi,*’ and you have been told, that the analogies of classical style are not to govern such instruments as the charter of 1780. No doubt, your Lordships are not to expect pure Latin in composition of this sort, but it is to be observed, that when ‘of Edinburgh’ is plainly meant to be expressed by the charter, the words ‘*de Edinburgi*’ are used, not ‘*Edinburgi*’;—but this question is not necessarily involved in the grounds upon which I am about to advise your Lordships to give judgment. Nothing is more clear in law, than that grants from the crown are to be interpreted altogether differently from private grants, the latter being always taken most favourably to the grantee—crown grants being always interpreted most favourably to the grantor; and if any crown grant is to be taken most unfavourably to the grantee, it is when the King is granting in favour of one individual, or body of individuals, some right or practice, to the exclusion and injury of all others. This would be true, were the disputed words applied to existing rights and existing institutions; but, in the present case, they must be interpreted according to the appellants’ arguments, as if they went forward to future time, covered future rights, excluded future generations from their share in future institutions,—and it is upon this ground that I will strictly interpret the present charter. In affirming, it might not be necessary to go into much argument. I shall, however, add a few words, to satisfy your Lordships that this is not an old Court, existing at the time these different instruments were made, but a new Court. The Sheriff takes this view, as appears from the terms of his commission. He first sets forth, that, by the Act of Parliament, he is ‘specially authorized and required to nominate a fit person to be Sheriff-substitute,’ but when he comes to vest in the substitute his power over the whole county, he does not do it under the authority of the Act of Parliament—he conveys it as having power by his commission as Sheriff-depute: and at common law, he says—I, by my general power, make him my general substitute, after having created him the Leith substitute, by the power given in the Act

Nov. 24, 1830. of Parliament. It is clear, that, according to his view of his own powers, he granted the commission partly under the Act of Parliament, and partly under his general powers. Then comes the Act of Parliament, the terms of which are of considerable importance: 'And be it further enacted, that within six weeks from and after the passing of this Act, it shall and may be lawful for the Sheriff-depute of the county of Edinburgh, and he is hereby specially authorized and required to nominate and appoint, and from time to time thereafter, as any vacancy may occur, or pro tempore if necessary, a fit person, qualified according to law, to be the Sheriff-substitute in and for the said town of Leith, and such districts adjoining thereto, as to the said Sheriff-depute shall seem proper, for the due administration of justice within the same; and that no appointment of any such person as Sheriff-substitute shall be valid, or enable any such person to do any act by virtue thereof, unless there shall be annexed a certificate under the hands of the Lord President of the Court of Session, and the Lord Justice-Clerk, bearing that such person is duly qualified and capable to discharge the duties of the said office, which certificate, after due enquiry made, the Lord President and Lord Justice-Clerk are hereby required either to grant or refuse.' Observe that the act describes the particular persons and provides that 'no appointment of any person as Sheriff-substitute shall be valid,' unless qualified as there directed—which qualification does not appear to be required of an ordinary Sheriff-depute. The powers being granted, the constitution of the Court is set forth as follows: 'And be it further enacted, that the said Sheriff-substitute shall be resident within the said town of Leith, and shall keep or hold such daily or regular Courts therein, in the Court-room to be provided for that purpose, in manner after mentioned, as shall be necessary for the full and due administration of justice, both civil and criminal, as fully as it is competent to any Sheriff-substitute elsewhere in Scotland; and the sentences or judgments of the said Sheriff-substitute, as Sheriff-substitute, or as Depute-Admiral, shall be subject to such and the like review, as the sentences or judgments of any Sheriff-substitute or Depute-Admiral are severally and respectively subject and liable to by the law and practice of Scotland.' Where was the reason for these regulations? Money might be wanted, but was the power of regulation wanted? If the Sheriff had the power before, where was the necessity for saying that the substitute should have an appeal from this Court to himself? He had that at common law, according to the argument for the appellants. It is nevertheless enacted, that he shall have jurisdiction and appeal, as in the case of ordinary substitutes. Your Lordships will observe how differently the deputation by the Admiral is mentioned. The expression is, 'If the Judge Admiral of Scotland shall grant,'—it is only if he think fit to exercise his anterior powers, that the substitute is to do certain things, when empowered. The Sheriff-depute was to appoint a substitute to the Court when created. Had the appointment been upon the old common law footing, and in execution of the Sheriff's

common law power, it would have been in different terms; it would have Nov. 24, 1830. been in terms similar to those of the clause applicable to the Admiral deputation,—‘ If the Sheriff-depute shall appoint a substitute’—and as the act requires him to do so.—‘ When the Sheriff shall appoint, be ‘ it enacted, that the substitute appointed shall ‘ do and enjoy certain things. These are the grounds on which, independently of the construction of the charter, (though I think the construction aids my proposition,) and purposely leaving out of view altogether the power of the Crown to grant such charters, I am led to the conclusion, that the judgment must be affirmed. Upon the ground that the Court is a new one, not in existence at the date of the former grants; and on the construction of the charter of 1780, and on principle, I take leave to advise your Lordships, that the appellants cannot have an exclusive right of practice, and that the several interlocutors of the Court below, repelling the reasons of advocacy, were well founded. My Lords, I would therefore move your Lordships that the appeal be dismissed, and the interlocutors affirmed.

The House of Lords accordingly ordered and adjudged that the interlocutors complained of be affirmed.

SPOTTISWOODE and ROBERTSON,—RICHARDSON and CONNELL,  
—Solicitors.

JAMES MORTON, (BROWN’s Trustee,) Appellant.—*Campbell—* No. 44.  
*Jarves.*

HUNTERS and Co., Respondents.—*Robertson.*

*Sasine.*—*Right in Security.*—Held (affirming the judgment of the Court of Session), 1. That the omission of the Christian name of the Baillie, where his surname and place of residence is given, is no objection to a sasine. 2. That although the Christian name of a witness be written on an erasure in the instrument of sasine, it is no objection to it; and 3. That a sasine proceeding on an heritable bond for a cash credit for L.5000, and three years interest thereon, at the rate of five per cent, is good.

*Proof.*—Observed, That hearsay evidence and parole testimony, as to the contents of a letter not alleged to be destroyed, ought to be struck out of a proof taken on commission.

The Respondents, Messrs Hunters and Co., bankers in Ayr, Nov. 26, 1830. having agreed to allow William Brown of Lawhill a cash credit, to the extent of L.5000, he granted an heritable bond and dispo- Lord Newton.  
1st Division.  
position to them for the advances to be made to him, but declaring that ‘ the whole sums to be recovered, in virtue of the said

Nov. 26, 1830. 'bond, shall not exceed the sum of L.5000, and three years interest thereon at the rate of five per cent, conform to the 14th section of the act 54 Geo. III. cap. 137,' and sasine was given under a declaration in the same terms. The instrument set forth that Hugh Brown appeared as attorney for the respondents, and 'passed with us and Brown in Dubbs, parish of Stevenston, bailie in that part, specially constituted by virtue of the precept of sasine after inserted.' In the concluding or testing clause, it was stated that Mathew Brown and another were witnesses to the premises, but the word *Mathew* was written upon an erasure. His subscription, however, was quite correct, and it was not denied that in the record he appeared as one of the witnesses.

Brown having become bankrupt, and his estates having been sequestrated, Morton, the trustee, brought an action of reduction of the instrument of sasine, on the ground, 1. That the omission of the Christian name of the bailie was a fatal objection; but that at all events, at the date of the alleged instrument, there were two places in the parish of Stevenston called Dubbs, in each of which there were various persons of the name of Brown, so that in fact there was no bailie named in the instrument, and it was impossible to discover what person acted as bailie on the occasion of giving the sasine, or whether any bailie was present at all, or any infestment truly given. 2. That the erasure of the name of the witness was fatal to the instrument; and, 3. That as the amount of the principal sum and interest was not limited to a certain specific definite sum, the security was ineffectual.

In defence, the respondents maintained, 1. That the objection founded on the omission of the Christian name of the bailie was irrelevant, because he was otherwise sufficiently pointed out; that at the date of the instrument of sasine, there was only one farm or dwelling-place called Dubbs in the parish of Stevenston, and there the person who officiated as bailie had his dwelling-place, and they denied that there was any other place of the name of Dubbs in that parish where any person resided, although there was a colliery of that name; or that various persons of the name of Brown resided in Dubbs. 2. That the objection founded on the erasure was irrelevant; and, 3. That the amount of principal was set forth, and although the interest was not specified in so many pounds, it was quite definite and conformable to the statute.

The Lord Ordinary, before answer, allowed the parties a proof of their allegations, relative to the identification of the

bailie. A proof was accordingly led, in the course of which, a Nov. 26, 1830. witness was permitted to depone as to facts communicated to him by a person still alive, and produceable as a witness; and another was allowed to state the import of a letter without the letter itself being produced. The Lord Ordinary, on advising the proof, ordered Cases, and having reported them to the Court, their Lordships directed the following query to be submitted to the other judges for their opinion, 'Whether the omission of the Christian name of the bailie in the sasine in question, rendered the said sasine null and void?' Lords Justice-Clerk, Glenlee, Alloway, Pitmilley, Cringletie, Meadowbank, Mackenzie, Medwyn, Corehouse, and Newton, returned the following opinion:—'We have considered the revised cases, and have examined the instrument of sasine in question, and are of opinion that the omission of the Christian name of the bailie in the sasine does not render the instrument null and void. The authority to infeft flows from the command of the superior, or grantor of the deed, as expressed in the precept of sasine. The precept must contain a special mandate to this effect, and no general powers, however ample, will suffice; but the name of the person to whom this mandate is committed is left blank in the precept, and never filled up. Any person can execute the precept as bailie. Mr Walter Ross thus describes the manner in which this business is accomplished: "The first movement is made by the party or his attorney, possessor of the charter containing the precept. He requires the attendance of a notary-public to certify the act. They next, in virtue of the blank left in the precept for the bailie, choose a person to fill that office, and get witnesses to attest the whole fact."—Ross's Lectures, Vol. ii. p. 178. It seems sufficient, therefore, *first*, for validating the act of the bailie, that the precept of sasine should be delivered to a particular person, no matter whom, different from the attorney and witnesses, and handed over by this individual, whoever he may be, to the person who acts as attorney, in presence of the witnesses, and that after the precept has been read by the attorney, the person acting as bailie deliver the symbols; and it seems sufficient, *secondly*, for rendering these acts authentic, that the notary, in the instrument and docquet, attest them to have been done by a certain person officiating as bailie. The name of this person must indeed be given, and it is no doubt usual and proper to insert the Christian name, as well as surname; but this does not appear to be indispensable, if it is

Nov. 26, 1830. ' asserted on the face of the instrument, and attested in the  
' docquet, that a certain person officiated as bailie in giving  
' seisin, and if this individual is so described that he may be  
' known and distinguished from others. There is a case re-  
' ported by Dirleton which illustrates those principles, by pro-  
' ving that even a mistake committed by the notary, in men-  
' tioning the name of the person who actually gave seisin as  
' bailie, and confounding him with the attorney, will not inva-  
' lidate the infeftment, if it appear from other parts of the seisin  
' that there were actually two different persons employed, one  
' as attorney, and the other as bailie :—" The Lady Cheynes  
' being infeft in an annual rent upon a right granted by her  
' husband, her seisin was questioned upon these grounds—1st,  
' That it was null, in so far as the bailie and the attorney in the  
' seisin were one person, who could not give and take the seisin,"  
' &c. " The Lords, in respect it did appear evidently that it  
' was a mistake of the notary that the seisin did bear the same  
' person to be both bailie and attorney in the clause of tradition,  
' and seeing by the first part of the seisin it was clear that there  
' was a distinct attorney, who did present the seisin to the  
' bailie, did therefore incline to sustain the seisin," &c. In the  
' present case, a parole proof has been rendered competent and  
' necessary, because the purpose of it is not to contradict the  
' written instrument, but to explain an omission in it, and be-  
' cause one of the reasons of reduction libels, " that the bailie  
' is not so designed as to point out the person, or give any in-  
' formation who the bailie was, there being in the parish of  
' Stevenston two places called Dubbs," &c. Now it appears from  
' the proof, that the person who is said to have acted as bailie,  
' in giving infeftment, was little known by his Christian name;  
' but that, in order, in all probability, to distinguish him from  
' others of the same surname, who lived at no great distance  
' from him (though not on the same farm, nor in the same pa-  
' rish), he was generally designated " Old Brown in Dubbs," or  
' " Old Dubbs," or " Brown of Dubbs, in the parish of Steven-  
' ston," or " Brown in Dubbs."—Defenders' proof, p. 29, D ;  
' Pursuer's proof, p. 16, C, &c. It may have been from this  
' cause, joined to the circumstance of the notary filling up the  
' blanks at an interval of time (and not having very perfectly  
' fulfilled the duty, as expressed in these words in his docquet,  
' *et in notam cepi*), when he only recollected the bailie by the  
' name which was usually given to him in the country, and  
' when the Christian name had either slipped from his memory,

‘ or had never been known to him, that the omission in question Nov. 26, 1830. ‘ has occurred.’ From this opinion Lords President, Craigie, and Gillies dissented, while Lord Balgray concurred. The Court accordingly, on the 10th of December, 1828, repelled the objections to the instrument of sasine, sustained the defences, and assolizied.\*

Morton appealed.

*Appellant.*—1. An instrument of sasine is an important and essential part of a title, and must be in every respect complete. If slovenliness be permitted, it will be impossible to assign any limit to such a permission. It is therefore necessary to preserve perfect accuracy. In giving sasine, either the superior or his bailie must be present. In the precept the name of the latter is generally left blank; but it is requisite that the name of the particular person who has officiated be set forth in the instrument. It is not enough to state the surname of the bailie, because this no more identifies the individual than if the Christian name without the surname was given. The matter is thus left in uncertainty; besides, the proof shows that there were other persons of the name of Brown who resided in Dubbs, parish of Stevenston.

2. By the Statute 1681, cap. 5, witnesses must be specially named and designed in instruments of sasine; but as the word Mathew is written upon an erasure, it must be held *pro non scripto*; and consequently, the name being defective, the instrument falls under the sanction of nullity.

3. The words of the statute 54 Geo. III. c. 137, are quite express, ‘ that the principal and interest which may become due ‘ upon the said cash accounts or credits, shall be limited to a ‘ certain definite sum, to be specified in the security,—the said ‘ definitive sum not exceeding the amount of the principal sum, ‘ and three years interest thereon at the rate of five per cent.’ But the sasine does not specify any definite sum,—it merely declares that the security is given for a sum not to exceed L.5000, and interest. It is not relevant to say that this affords data for specifying the sum. The enactment of the statute is, that the sum shall be specified, and is equally imperative with another section of that statute relative to valuing and deducting securities in claiming on the bankrupt estate, and specifying the ba-

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\* 7 Shaw and Dunlop, p. 172.



Nov. 26, 1830. *lance*. It has been held that although the security be valued, and consequently a mere arithmetical operation required to be performed, yet if the balance be not specified, the claim is objectionable.

*Respondents*.—1. It is not essential in point of solemnity that the Christian name of the bailie be mentioned, if he be otherwise so described and identified as to point out the person who officiated. In the present case the surname, the place of residence, and the parish, are given in the instrument. This is a sufficient specification, and there being no ambiguity on the face of the instrument, extrinsic evidence to the effect of introducing ambiguity was incompetent. The proof, however, clearly establishes that there was only one Brown who resided at Dubbs, in the parish of Stevenston.

2. It is not denied that in point of fact Mathew Brown was a witness at the taking of sasine, nor is it alleged that the erasure was made posterior to the recording, which it could not, because the instrument and the record correspond, and the signature of the witness is unobjectionable.

3. The statute has been sufficiently complied with. It is immaterial whether the sum is set forth as L.5750, being the amount of principal and interest for three years, or whether, as is actually done, the principal sum be specified and the words added, ‘with three years interest at five per cent.’

LORD CHANCELLOR.—My Lords, in a case like the present, involving questions upon the law of real property in Scotland, the principles of which, in its origin, bore a near resemblance to, if they were not altogether the same, with those of the English law, although, by lapse of time, they have come to be so widely different, that, in many respects, they may be rather said to be opposite to one another than merely unlike, I should be very slow indeed to take up an opinion, even if I thought I saw ground to maintain it, which went to reverse an advised judgment of those learned persons who adorn the Scottish Bench, after having been for years the ornaments of the Scottish Bar, and practised for years in that branch of the profession which deals with the rights of real property. I should come with the greatest hesitation, and, I may say, even alarm, to any conclusion that might seem to differ from theirs;—for it is needless to remark, how little we generally learn of foreign law, and foreign systems of jurisprudence, unlike our own, by merely consulting statutes—which have oftentimes an interpretation affixed to them by practice widely different from the apparent and plain meaning of their words,—or by resorting to judicial decisions or the opinions of text-writers, or to the incidental dicta of judges; for all those sources (and they are the only sources from which the law of any foreign country can be learned) are liable to be

controlled and modified in practice by that which no books can teach, and Nov. 26, 1830. which can only be learned by being, as it were, incorporated with the profession in whose hands that practice is. This consideration would always be with me a reason for receiving, with great reluctance, impressions contrary to the decisions of the Court from which the appeal is brought, when that Court has deliberately, by a great majority of its Judges, come to a decision upon a question purely of Scottish law. But in this case, the reasons given by those learned Judges in support of the decision, and the arguments which arise out of the case, appear to me, from the best attention I have been able to pay to it, so entirely to go along with the judgment itself, and so amply and decisively to support that judgment, that I feel a double confidence in the proposition which I am about to submit to your Lordships, now to affirm this decision; and, feeling that confidence so strong, I have the less hesitation in presuming to adopt this course, because it saves much time (the time being that of the public) for other causes, which so much crowd the list of appeals. My Lords, I have endeavoured, during the able argument of the learned gentleman who has addressed your Lordships for the appellant, to examine the cases to which he referred, and the authorities he cited, and the reasons which he urged; and I had also, before coming to this House, examined the printed cases on each side, for the purpose of saving your Lordships' time; and I am not enabled to discover any thing like a reason for impeaching the judgment of the Court below. The first question made, and the only question which will admit of any discussion, is the omission of the Christian name of Brown, the bailie, who is called "Brown in Dubbs." And first, it is said, that where the Christian name is omitted, there is a flaw in the instrument, which no evidence dehors that instrument can supply,—that it is fatal to the validity of the instrument, and that it stands as if there were no bailie who is asserted in the instrument to have given sasine. My Lords, the law of Scotland, which was originally the same with respect to the livery of sasine, as our ancient mode of conveyance by feoffment, and livery of seisin, has, in process of time, come to be, in one or two particulars, materially different. With us, if the feoffment is good, and there is an actual livery and seisin of the land, that is sufficient. It is usual, I admit, and all our authorities so put it—they say that it is usually safe and convenient—they never go so far as to say, that it is absolutely and indispensably necessary—that there should be a memorandum of that proceeding, which, when it is made, is either appended to the deed, or indorsed upon the deed of feoffment itself; and it generally purports that seisin has been given in the manner which has been referred to by the learned gentlemen from Scotland, in the same terms as their instrument of sasine, or to the same purport. It uses the word "attorney" instead of "bailie;" but there is no substantial difference. It states, that livery was given of the land by A. B., attorney for the feoffor, to C. D., attorney for the feoffee. That proceeding is usual, and it is convenient, but I apprehend it not to be essential. Whatever it may have been originally, in process of time it has ceased to be

Nov. 26, 1830, absolutely essential; and there may be a good livery without it;—but, if there be any thing defective in the livery itself; or if there be no livery at all, the feoffment itself would be void as a feoffment, though it might ennure as a covenant to stand seised to uses within the restrictions of proximity of blood, which apply to that mode of conveyance. But in Scotland, I take the law to be different. There the instrument of sasine is essential to the conveyance. There must be a sasine, otherwise the rule of the feudal law applies, *nulla sasina nulla terra*; but here must also be a constat of that act. There must be an instrument of sasine, and that instrument of sasine is an essential part of the conveyance. The question then is—and here we are upon a question purely of Scotch law, because I have just said the two systems of law, which were alike in their origin, have branched asunder, in the progress of time—namely, Whether the instrument of sasine being thus necessary, the omission of the bailie's Christian name is, or is not, a fatal defect in that instrument, making the conveyance void, as if there had been no instrument of sasine? Now, my Lords, it is agreed on all hands, that there must be clear proof upon the instrument that there was a bailie. There must be no confusion or doubt upon the instrument, taking it altogether, that the bailie and the seisor (that is to say, the person purchasing and taking the investiture of the title by the seisin) were different persons. It must appear, one way or another, upon the face of the instrument, that there was a bailie to give the sasine, and another person to take the sasine. I will not stop unnecessarily to moot the point, because the question does not arise here, whether or not a sasine would be good in which one person acted as a common agent for both parties, and took the seisin with one hand for the feoffee, which he gave with the other hand for the feoffor. That question does not arise upon the facts of this case. But it is necessary that there should be a bailie to give the seisin, and an attorney, or some person on behalf of the purchaser, to take the seisin. Have we therefore these necessary requisites concurring in this instrument? Unquestionably, no man can read it, and doubt that there was a bailie to give and a person to take the seisin on behalf of the feoffee. But then, it is said that "Brown in Dubbs" is a patent ambiguity; and it is endeavoured to be made out to be a patent ambiguity by an ingenious and subtle, but, it appears to me, an unsatisfactory and inconclusive process of reasoning. I should hold it to be about as clear a proposition, in point of law, as I ever yet heard asserted, that when an instrument mentioned one man as the individual by one name, with the addition of his place of residence, that that is on the face of it unambiguous and certain, and that it requires you to go out of the four corners of that instrument, in order to make it appear that there were two or more Browns, or rather, that there were two or more Browns, tenants, or otherwise, in Dubbs. As far as appears on the face of the instrument, it is very possible (and that is sufficient to make it a latent ambiguity), that there may be no more than one Brown in Dubbs; that possibility is quite sufficient to destroy the patent nature of the ambiguity. It requires averment, as Lord Bacon says (who first laid down

the rule, which has been followed ever since in all the Courts with respect Nov. 28, 1830. to patent and latent ambiguity),—it requires averment to suggest that there are two Browns in Dubbs; and if averment, followed of course by evidence, shall satisfy you that there were more Browns than one in Dubbs, then what at first appeared to be clear and unambiguous becomes ambiguous, and then (for that is the origin of the rule respecting patent and latent ambiguity), when you have once raised the ambiguity by evidence dehors the deed, you are entitled to take more evidence dehors the deed, for the purpose of laying the ambiguity which evidence dehors the deed had raised. But until evidence, dehors this instrument, shows that there were more Browns than one in Dubbs, in my mind, it presents nothing ambiguous, equivocal, or doubtful whatever. For this reason, unless the law of Scotland has decided that it is fatal to an instrument of seisin to omit the Christian name of the bailie, on the one hand, or has decided, on the other hand, that it is perfectly immaterial to the validity of the instrument, whether the Christian name of the bailie appear or not, I say, unless the law has decided one or other of those two ways, I should hold that it is competent to give evidence, as in the case of a latent ambiguity. But, I take it, the error which the Court has fallen into rests here—that they have allowed evidence dehors the deed upon this question, when the law was clear one way, namely, that it was quite immaterial to the validity of the instrument whether the bailie's name was there or not. The party propounding that evidence was the appellant. The other party took up the challenge, and the Court, deciding between them, allowed them to go into evidence on the one side and the other. But, in my view of the case, the Court,—if its own authority is to be followed, which I am most willing to do, because it consists with the reason of the case, and with the principles of the Scotch law, and is really unimpeached by any authority, or by any decision,—the Court ought to have held that there was no case for evidence, because the immateriality of the Christian name of the bailie was pronounced by a very great majority of their Lordships. The Court, however, was pleased not so to hold, the consequence of which has been much expense, considerable protraction of these proceedings, and the laying before your Lordships' House that mass of any thing but legal evidence, which was the fruit of that unnecessary proof allowed below. I might state to your Lordships one or two instances of the want of any thing like legal nature or aspect in the evidence which has been produced. I might state, that those who took the proof allow particular statements of particular individuals to be given in evidence upon a question of reputation, which is not evidence by law. They allow one man to say what he heard another tell him, which is no evidence by law, that man being alive and produceable as a witness; and, even if he were dead, it is no evidence, because it is too particular upon the question of reputation. In another case, (and I observe upon this, not from the vain desire of carping at what has been done in the Court below, which is not a decorous proceeding in any Court, but I say it with the practical object, as far as my suggestion

Nov. 28, 1830. can have any weight with those learned persons who superintend such proceedings, of entreating their attention to a stricter enforcement of the rules of evidence below)—not only is one man allowed to tell what another man said, not upon oath, but what another man told him of the contents of a letter, which letter has not been produced in Court, and, in fact, was not even seen by the person who swore what he heard another tell of its contents. My Lords, I do hope and trust that those learned persons who superintend the taking of proof in the Court below, or, at all events, those learned Judges before whom the proof so taken by commissioners, from time to time may come, will consider the fearful consequences to the lives, to the liberties, to the properties, to all the most valuable rights of the King's subjects, of opening a door in judicial proceedings to hearsay evidence, which never can safely be trusted, and which, if allowed to enter into the mind of either judge or jury, must, of necessity, be fatal to the administration of justice. My Lords, with respect to the substance of the proof, supposing it were competent to go into it at all, I have the clearest opinion. But if I either throw out, on both sides, all that was not legal evidence, or if, following the opposite course, I take it all in, whether legal or not—in either way the inference is one and the same, that there is no ambiguity whatever—that there was but one single individual to whom the designation in the instrument of sasine, of "Brown in Dubbs," could apply. It was said that there was another Brown in Dubbs, and that part of Dubbs was in Stevenson, and part in Kilwinning parish; but that statement was wholly without support or warrant from the evidence. Whether you regard Scots money, or road money, or minister's stipend, or militia service as the tests of parochial boundary, there is no doubt whatever, that the suggestion fails which would attempt to show that part of Dubbs is in that parish. It is equally clear, that what is there called Dubbs, is not what in common parlance is called Dubbs, as in the instrument of sasine, but Dubbs colliery, which is quite a different thing; and then, as to what is said respecting other persons of that name, one of whom was a relation of the family, another of whom was the relation of a former Brown in Dubbs, that is entirely at an end, when your Lordships come to consider the almost technical meaning of the designation "Brown in Dubbs." It means, in so many words, Brown, the tenant of Dubbs; Dubbs being a farm as contradistinguished from Dubbs colliery; and the instrument of sasine only in fact says, that the bailie who delivered the infestment was the tenant of Dubbs farm. It is not contended that there was a change of tenant—it is not contended that there were two farms of Dubbs—it is not contended that there were two tenants of Dubbs. Consequently, I take it to be perfectly clear, even upon the proof itself, whether you take in all the illegal evidence, or shut out all the illegal evidence, and merely go upon the legal evidence, that no ambiguity whatever, upon the whole balance of that testimony, is raised, as connected with the instrument of sasine. But then it is argued, and subtly argued, that the ambiguity is patent, because the mere want of a christian name is in

law a patent ambiguity : That not only in England but in Scotland, the Nov. 26, 1830. christian name is a material name, and that the want of what is material in the name, is as if there had been no name at all, and that, consequently, the leaving out John or Robert, or whatever the christian name might be, is as if the whole instrument had been blank, so far as regards the name of the bailie. My Lords, our law is very nice and very technical in respect of christian names, and I do not at all dispute the proposition that was laid down at the Bar upon the import of that law. But in Scotland it is wholly otherwise. There is no such nice and technical exigency with respect to the christian name, dummodo constat de persona, sufficiently in the instrument. The case of *Murray v. Gordon* has been alluded to in support of this argument. Now, when I look at it, it appears to me to operate wholly the other way ; and with respect to the four cases cited, I must say this, that they come within a description of cases, as connected with this argument, which is exceedingly common at the Bar, where, in the pressure of circumstances, and when there is no authority of a decided case, it is very usual to produce what may rather be termed apologies for cases than cases. Counsel cite a great number of decisions, and they admit, that those decisions are against them, but then they show that none of the decisions apply to the case before the Court. That way of citing cases does not throw much light upon the question under discussion. Now, when I allude to *Gordon v. Murray*, that decision appears to me to be such, respecting the necessity of the christian name, as cannot be got over ; for, observe, it was rested there, not upon common law, which it ought to have been, if the Scotch law were the same as the English, as to the necessity of the christian name.—It is not rested upon the English law, but upon a statute of the year 1672, chapter 21 ; and, when you look to that statute, you find that it is merely directory—that none of the King's lieges under the rank of a peer shall sign without his christian name, as well as his surname. Upon what penalty ? Upon pain of nullity ? Upon pain of making the instrument void ? No such thing. Upon pain of being punished by Lion King at Arms, and his Majesty's Privy Council. Therefore, it was held to be a directory statute, not making the instrument invalid in the decision of *Gordon v. Murray*. Taking, therefore, the whole of this first branch of the case, I certainly, upon the reasoning, and upon the arguments which have been brought forward on behalf of the appellant, see no ground whatever for doubting the propriety of this very well considered, and very deliberate judgment upon this question of pure Scotch law, and question of Scotch conveyancing, which has been brought before us from those learned Judges.

With respect to the two other points of the statute of 54th of the late King, (chapter 137, section 24,) I take it to be clear, that that is entirely wide of the present objection ; that there is quite sufficient specification of the sum, when it is said, that “ the said sums, taken together, shall not exceed the sum of L.5000, and three years' interest thereon, at the rate of five per cent.” I think any words more clear and more plain

Nov. 26, 1830, could not have been employed, to express that the sum meant to be secured was three times L.250, together with the principal sum of L.5000.

My Lords, with respect to the third proposition, as to the name of the witness, it is said, that the attesting witness's name is written on an erasure. Your Lordships will please to consider, that this objection as to the erasure is made, not to the subscription of the witness, but to the insertion of the witness's name in the recital of the testing clause. But then, it is said, that though there is no erasure, whereupon the name is written below the notarial clause, yet that, because there is an erasure in the testing clause, the instrument is made void. Now, I see no warrant, either from the Act of Parliament of 1685, or from any authority that has been produced, to incline me to deviate, in the slightest particular, from the opinion which has been given by the learned Judges with respect to the third point, on which, I understand, they had no difference of opinion. Upon the first, I should not have troubled your Lordships at so great length, had it not been that there was a difference of opinion among those Judges, and it appeared, by taking the opinion of the consulted Judges, that it was deemed a point not quite settled, and had it not also been for the great deference I feel for the learning and experience of the learned Judge (Lord Craigie), whose opinion I differ from upon the present occasion. Upon the two other points, upon which there is no difference of opinion, I propose to take the course which I always intend to pursue. It was the ancient course, and it has only been broken in upon within the period of my memory and my experience at the Bar of your Lordships' House, namely, that, when the judgment appealed from was to be affirmed, there were no reasons given, and when the judgment was to be reversed then the Court gave reasons. I intend, with the permission of your Lordships, not to deviate from that ancient and convenient practice, and only to give my opinion at length when either there has been a discrepancy in the opinions of the Court below, and when the law may require to be looked into for the purpose of making it clear, or when there may be a reversal or a remit, or some direction given as to some further proceeding in the Court below. For these reasons I have no hesitation in moving your Lordships that this judgment of the Court below be affirmed.

The House of Lords accordingly ordered and adjudged that the interlocutors complained of be affirmed.

*Appellant's Authorities.*—2 Erskine, 3, 35, and 37. Murray, 22d June, 1821, (1 Shaw and Dunlop, 81.)

*Respondents' Authorities.*—7 Craig, 2. 2. 2 Erskine, 3. 33. 2 Craig, 7. Hillton, 24th February, 1676, (14,331.) Henderson, 8th March, 1776, (5 Sup. 506.) Gordon, 21st June, 1765, (16,816.)

A. MUNDELL,—RICHARDSON and CONNELL,—Solicitors.

HUGH COGAN, Appellant.—*Wetherell—Mill*

No. 45.

GEORGE LYON AND OTHERS, (CUMMING'S TRUSTEES,) Respondents.—*Spankie—Robertson.*

*Title to Pursue—Death-bed—Process.*—A party called as heir to A under a deed executed by B, having libelled his title to reduce a death-bed deed executed by A as heir of provision of B, held, (affirming the judgment of the Court of Session,) 1. That he had no title in that character to reduce A's deed; and, 2. That the defender was not barred from stating the objection, although he had joined issue on the merits, and a proof had been taken.

By a deed of settlement, executed by Robert Hunter on the Dec. 4, 1830. 28th of September, 1811, he disposed his property in favour of Ann Cumming, his wife, in case she should survive him, and <sup>2D DIVISION.</sup> Lord Pitmilley. failing her disposing and conveying the subjects, he destined them to Ann M'Indoe and others, in whose right the appellant now claimed. Ann Cumming survived her husband, and was infest. Within sixty days of her death, she executed a disposition of the property in favour of the respondents as trustees. On her death, Ann M'Indoe and the others, called as heirs of provision under the husband's deed of settlement, brought, in 1813, an action of reduction of the trust disposition executed by Ann Cumming, on the head of death-bed. In the summons they set forth their title as 'apparent heirs of the deceased Robert Hunter.' The Lord Ordinary having appointed the respondents to satisfy the production, they lodged a representation, stating that the pursuers had no title, as heirs apparent of Robert Hunter, to call for production of a deed executed by Ann Cumming, or to have it set aside. The pursuers then gave in an amendment, by which they made their title to run in these terms (the words in Italics being introduced), 'apparent heirs of provision of the deceased Robert Hunter, sometime candlemaker in Glasgow, conform to deed of settlement executed by the said Robert Hunter, of date the 28th of September, 1811, whereby he gave, granted,' &c. and they then recited the substance of the deed. This amendment was admitted by the Lord Ordinary, and the respondents ordained to satisfy the production, which they did, but their representation was not disposed of. In February, 1814, great avizandum was made, and a remit granted to discuss the reasons. The Lord Ordinary, before answer, appointed the pursuers to lodge a condescendence, and on advising it with answers, he also, before



Dec. 4, 1830. answer, allowed a proof. On this being reported to him, he ordered memorials, and on advising them, decerned in terms of the libel. The respondents then reclaimed to the Inner House, maintaining that the pursuers had no title, as apparent heirs of provision of Robert Hunter, to reduce Ann Cumming's deed. On this point, the Court ordered minutes of debate; and on the 27th of May, 1825, found, 'that the libel, both as originally laid, and as subsequently amended, being at the instance of 'the respondents, (pursuers,) as apparent heirs, or apparent heirs 'of provision of Robert Hunter, is an incompetent proceeding 'for challenging, on the head of death-bed, a deed executed by 'Ann Cumming;' and therefore dismissed the action, reserving to them to proceed in any other competent action. And the Court, on 7th December 1826, adhered.\*

Cogan (as in right of the other pursuers, now dead) appealed.

*Appellant.*—It is undoubted that the original pursuers, as heirs of provision of Ann Cumming, had a good title to challenge her deed. It is true that, per incuriam, they were described in the summons as heirs of provision of Robert Hunter; but their true character was at the same time set forth by a recital of the deed under which they had right as heirs of provision. The respondents satisfied the production, and joined issue on the merits after the title had been so amended, without making any objection, and therefore they are barred from now doing so. Such an objection is a dilatory plea, which is passed from by entering on the merits. At all events, the action ought not to have been dismissed, but the Court ought to have received a supplementary summons, which was offered.

*Respondents.*—Although a title as heir of provision of Robert Hunter would have been sufficient to have given the pursuers right to challenge a deed executed by him, yet it could never enable them to set aside a deed granted by another party. The respondents are not barred from objecting to the title, because their representation was never refused, and the proof was allowed before answer. Besides, where the title on the face of the summons is insufficient to warrant the conclusion, it is not only competent to a party to state the objection at any time,

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\* 5 Shaw and Dunlop, p. 92.

but it is the duty of the Court itself to dismiss such a summons. Dec. 4, 1830.

It is true, that where a party libels a title sufficient to warrant the conclusion, a defender may be barred, by joining issue on the merits, from objecting that the party truly has no such title. But here the objection is not of that nature. It is, that assuming the pursuers to have the title libelled, it cannot entitle them to set aside the deed challenged. In regard to the supplementary summons, although it might have been competent before the proof was taken, it is not so thereafter.

LORD CHANCELLOR.—My Lords, by the law of Scotland, a death-bed deed is set aside, under certain restrictions, either at the instance of the heir of the maker of the deed, or the heir of provision to that person, I will not say of, but to that person. A death-bed deed, or at least one which was deemed to be reducible on that ground, having been granted by Ann Cumming, in the execution of a power which she had, under a settlement made by Robert Hunter, of giving the estate which was vested in her for life, after the termination of her estate for life, the present Appellants brought their action in the Court of Session, and stated themselves in the summons to be the ‘ heirs of the deceased Robert Hunter,’ which, by amendment, stands now thus :—‘ The heirs of provision of the ‘ deceased Robert Hunter, according to, or conform (as it is called) to a ‘ deed’ which vests the life estate in Ann Cumming, with certain powers of appointment to her, and in default of the execution of such powers, with remainder to those parties who state themselves, nevertheless, to be the heirs, not of Ann Cumming, but of Robert Hunter. The short question this appeal brings before the House is this,—and it is a question wholly of Scotch law pleading, and Scotch law practice—Whether or not the pursuer has a sufficient title to insist in an action for the reduction of a deed on death-bed, seeing that in his summons he states himself to be the heir of A, in which capacity he would have no right to pursue the reduction, but who, by amendment, has afterwards been permitted to state himself not truly and absolutely to be the heir of A, but the heir of A under a deed, which being set forth in the summons, shows him not to be the heir of provision of A, but the heir of provision to B ; and it being admitted that in his capacity of heir of provision to B, he, if he were heir of provision, might have pursued this action of reduction to set B’s death-bed deed aside? The simple question which this action brought before the Court, and on which alone the Court has adjudged, is, Whether this summons sets forth a sufficient title to pursue ; or rather, Whether it does not, on the face of it, introduce such a title as excludes the party setting it forth from pursuing the reduction? That the decisions of the Court below should ever be held in a Court of Appeal to be impeccable, as it has been called by the learned counsel for the appellant who argued this case—that the judgment brought into question by the appeal should be held to be an overruling authority, and decisive in a Court of Appeal, is a

Dec. 4, 1830. proposition really too absurd, and indeed too self-contradictory to be for a moment entertained. But, my Lords, I certainly should feel disposed to pause, even where I did not myself see the best and soundest reasons for supporting the decision in the Court below, when, on a pure point of practice and the formality of pleading in that Court, I found the weight of six learned judges there in one voice deciding that the objection to the pursuer's title is fatal, and when of those six there is only one, who, after a considerable period given for deliberation and review of that opinion, comes round to an opposite view, and stands, therefore, in opposition, on this point, to the whole of his brethren. The principles which have been alluded to (rather than very clearly defined), on which the Scotch Courts hold this very great strictness, are those which must chiefly guide us, and furnish the rule enabling us to decide between the opinion adopted by Lord Alloway, and that of the five other learned Judges, whose authority I take, undoubtedly, to be eminent on such a question. I would refer your Lordships, also, to the principles which have been stated, and are, as far as they go, borne out by one or two of the cases, particularly the old case of the division of the land of Mount, and which I can by no means agree with the counsel for the appellant in thinking wholly inapplicable. It is relied on by Lord Glenlee as bearing mainly on the question; and it does not merely say that a person having a right of servitude—a right of pasturage—has no title to support an action for a partition of common; but the case is this, That it being found on the face of the libel that he had so set forth a servitude in himself, and nothing more, the Court set aside all the proceedings that had taken place, the libel, the condescendence, the answer, and the proof which had been made in the cause—all those proceedings were set aside at the eleventh hour, because the libel only set forth the servitude. Upon these grounds, I incline to the opinion of my Lord Glenlee; and, advertng to the extreme strictness which the rules of pleading require in setting forth a pursuer's title—taking into consideration the effect of the doctrine of death-bed, and that it is known to Scotch lawyers as (next to questions of conveyancing, in respect of entailed property under the Act of 1685) the one on which, perhaps, the greatest strictness, and the most technical nicety are required—taking this into account, and not laying out of my view the answer given to the difficulty by the learned counsel for the respondents, respecting the way in which this deed is inserted by amendment in the summons, so as to become, as it were, not an averment, or a portion of the averment of the pursuer's title, but rather a part of the evidence referred to by him in support of it, that title standing upon the face of the summons by plain distinct averment, (for there is an averment in this case that the pursuer pursues as the heir of Robert Hunter, and not as the heir of provision of Ann Cumming, the maker of the deed,)—taking these things into account, and considering, above all, the peculiar nature of this question, I shall only state, that, if I were now to advise your Lordships, I should humbly submit to you to affirm this judgment. Even had I not seen my way so clearly as I think I do, I should have been most slow to urge your

Lordships to reverse, upon such a point, a decision so come to; still more Dec. 4, 1830. should I be slow to urge your Lordships to reverse, when I think I do see my way to a conclusion conformable to that at which the Court below arrived. I shall only further submit the reason why I would abstain, for the present, from urging you to affirm. Much of the weight due to the decision of the Court below must needs depend upon their having had a just, accurate, and correct view of all the facts before them when they pronounced that judgment; and I should have no doubt whatever of the deference due to that authority, if I saw distinctly, from the view taken by the Judges who gave their opinion,—the greatest number of them against the pursuer's title, in respect of the manner in which the summons set forth his claim,—that they had clearly and distinctly before them the amendment of the summons. There are one or two expressions used by the Judges which would lead me to suspect they had confounded the amendment of the summons with the supplementary summons, one of them distinctly speaking of the amendment as to be rejected in that stage of the cause. I think that can only have meant the supplementary summons, for the amended summons had been received. These matters seem to me to require that I should, before submitting to your Lordships the proposition for affirming this judgment, carefully examine the opinions of the Judges, and look to the forms and styles, as they are called, the mode in which the summons of reduction, under the head of death-bed, is usually framed in the Court of Session. I cannot help again expressing my deep regret, that this will lead to so unsatisfactory a result for both parties; for I am afraid the inevitable consequence of affirming this judgment will be, that it must go down to be argued again upon the merits, this being only a preliminary objection in point of form. My Lords, I have looked in the case of *Harford v. Harvey*,\* and I find it by no means applies. It is not at all a precedent for authorizing this House to do so extraordinary a thing as to constitute itself a court of original jurisdiction in a case brought by appeal, for in that case the objection was to a part of the evidence; but there remained a sufficient part of the evidence, which was unexceptionable, to support the judgment to which the House came; and the Lord Chancellor, in moving the judgment of the House, expressly states, that the ground on which he proceeded was, there being evidence in the cause sufficient to support the judgment which he was about pronouncing, even if he rejected all the evidence which was objected to. My Lords, if both parties should, on further consideration, agree, as by consent, to save the additional expense and delay of having the cause sent back to the Court from which it came, after a judgment on the preliminary objection shall have been given, then, undoubtedly, there can be no objection to this House doing that which it would wish above all things to do—rectifying the defect in the cause as it now stands. It is gratifying to know, that, of these objections, we

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\* 2 Billh.

Dec. 4, 1830. shall hear nothing in cases since the late Jury Act; but in this case the Court proceeded according to the ordinary course of practice which had been adopted for ages, and did only what was sanctioned by that practice. It is a very happy circumstance for the suitors of that part of the kingdom, that the better mode of trial by jury will prevent those circumstances recurring. These are the reasons, in reference not only to the forms of your Lordships' House, but to the authority of the very learned persons who decided this case, why I should propose to your Lordships that the further consideration of this case be adjourned.

LORD CHANCELLOR.—My Lords, this case, which was argued a few days ago, is one in which, as I have already stated, there are several matters of considerable nicety touching the Scotch forms of pleading, and the general principles of law which must govern the case. There is no material discrepancy in relation to the law of death-bed, but with respect to the particular form of pleading, there was the greatest difference; and although I entertained, myself, a pretty confident opinion what the result of the case ought to be, I was desirous of ascertaining whether the learned Judges who pronounced the judgment had taken a correct view of the facts, in consequence, as your Lordships will recollect, of some of the learned Judges using the expression 'amended summons,' when it is clear the amended summons made no real difference in the form of the pleadings, and it rather appeared to me, that it was the supplemental summons which was adverted to,—the amended summons having been admitted. I wished to look into the case a little further, to remove that doubt. Further enquiry has removed it; and I am now about to submit to your Lordships that this judgment ought to be affirmed. I have stated on a former day, that, generally speaking, it is not my intention, in moving your Lordships to affirm the judgments of the Court of Session, to offer reasons for that proposition. Upon this occasion I shall simply add to that which I stated before, that it appears to be a question simply and purely of Scotch law and Scotch pleading; that I find no reason to doubt, upon the authorities, the soundness of the judgment which the learned Judges have pronounced. One learned Judge, Lord Alloway, gave a distinct opinion as to the technical niceties of the case; his Lordship afterwards appears to have varied, if not changed, his opinion. The other learned Judges held to the opinion they had first pronounced. It is a very great nicety, no doubt. It is a nicety which we do not certainly, by our rules of civil pleading, admit at all, though your Lordships know very well, that, in the criminal proceedings in this country, there are some rules so imperative, and of such exigency on parties pleading, that nothing equivalent can supply the defect of words. I refer to cases of felony and murder. But it appears that, in Scotland, actions for reduction of deeds executed on death-bed being very little favoured, the Courts have held, that, in setting forth the ground upon which the pursuer seeks to reduce such a deed, he must set forth distinctly the right in which he sues. It appears that this party set himself forth originally as the heir of provision to Robert Hunter,—the words heir of provision to Robert Hunter in the amended summons being stated

to be conform to a particular deed ; but the pursuer not being the heir of Dec. 4, 1830. provision to Robert Hunter, but the heir of provision to Ann Cumming, the maker of the deed, he did not sue, describe himself as, and insist (as indeed he could not, in this action) on his right as heir of provision to the grantor of the deed, Ann Cumming. According to the rules of Scotch pleading, a defect in the title of heir cannot be cured by equivalent words, and can still less be amended in a later stage of the case, by a supplemental summons, which, in fact, would create a new action.

I cannot help, upon the present occasion, expressing what has often occurred to me as counsel before your Lordships, and which I have also considered in a legislative capacity, in reference to the amendment of our laws, both in Scotland and in England,—I mean the peculiar hardship under which your Lordships are placed—under which the Scotch Courts are placed—under which the Scotch law, and the people of the country of Scotland are placed—by the want of aid from learned Judges cognisant of, and, from long habit, daily conversant with the law, particularly where there occur the technical niceties of the law of that part of the United Kingdom, and most especially is this inconvenience felt, when there has been a difference of opinion below. Your Lordships are aware how much better we are off in England in reference to English law questions, where the learned Judges have differed, and where writs of error are brought, involving points which it is for the interest of the people to have settled. In respect of decisions of the Court on those points, your Lordships, wherever any difficulty occurs, would have the assistance of the twelve Judges, acting as the assessors of your Lordships, and whose opinion is hardly ever deviated from, though, undoubtedly, it is not binding on this House. Unfortunately, no mode is presented in which we can have any such assistance on Scotch law questions ; and this leads those who advise your Lordships to be extremely slow in technical questions, or reasoning from technical rules of the law of Scotland—and slow they ought to be, in the situation in which I describe them to be—in calling upon your Lordships to reverse decisions deliberately come to by those learned individuals most constantly conversant with those points of pleading and of technicality. I would humbly move your Lordships, without going farther into this case, that the judgment be affirmed. In this case I should propose no costs.

The House of Lords accordingly ordered and adjudged that the interlocutors complained of be affirmed.

*Appellant's Authority.*—4 Ersk. 1. 66 and 67.

*Respondents' Authorities.*—Stewart, 21st Dec. 1739, (2472.) Peacock, 24th Nov. 1821, (1 Shaw and Dunlop, 168.) Jackson, 9th Dec. 1825, (4 Shaw and Dunlop, 292.) Macdonell, 20th Jan. 1826, (4 Shaw and Dunlop, 371.) Kerr, 10th July, 1827, (5 Shaw and Dunlop, 926.) A. S. 7th Feb. 1810. Maul, 4th March, 1817, (F. C.)

J. BUTT,—A. M'CRAE, Solicitors.

No. 46. WILSON AND M'LELLAN, Appellants.—*Jo. Campbell*  
—*T. H. Miller.*

DUNCAN SINCLAIR, Respondent.—*Spankie—Robertson.*

*Repetition*—Held, (reversing the judgment of the Court of Session,) 1. That where a payment has been made in virtue of a decree in absence and diligence thereon, repetition cannot be ordered so long as the decree and diligence are not set aside; 2. That it is not relevant to entitle a party to repetition to allege that he has paid under a mistake in point of law; and 3. That a party who has had the means of knowing the facts before making a payment, and seeks reparation on an allegation that he paid under a mistake in point of fact, may be barred from claiming repetition.

Dec. 7, 1830.

1st Division.  
Lord Newton.

ALEXANDER M'CRA, on the 25th of July, 1820, granted his promissory note to Duncan Campbell for L.130, payable three months after date. Campbell endorsed this note to Harrison, and by him it was endorsed to another party, who endorsed it to Wilson and M'Lellan, merchants in Greenock. By them it was discounted with the Greenock bank. When it fell due, on 28th October, it was dishonoured by M'Cra, and was thereupon protested by the Bank, from whom Wilson and M'Lellan retired it, and got up the protest with a receipt. It was alleged that the note was vitiated in substantialibus; but if it was so, at this time it did not appear to have been observed by any of the parties. The protest, however, contained a material blunder. It set forth, that the note was payable on the 28th of July, and that it had been protested upon that day, in place of the 28th of October. It was recorded at the instance of Wilson and M'Lellan, extracted, and letters of horning raised. The letters were transmitted by the agents of Wilson and M'Lellan to Angus Sinclair, messenger at Oban, with instructions to execute them against M'Cra, Campbell, and Harrison. He charged Harrison, but reported that he could not find the other parties. Having returned an execution against Harrison, letters of caption were expedited, which the agents for Wilson and M'Lellan sent to Sinclair on the 4th of January, 1821, desiring him 'to execute the enclosed caption against Harrison on receipt, and report to us in course that you have done so.' They afterwards, on the 11th, by authority of Wilson and M'Lellan, sent a state of the debt to Sinclair, and mentioned that, 'in case a bank draft or other document is sent us for the debt, which will not be due before the 20th, you must add interest till the time such draft falls due.' Sinclair, on the 22d, sent to the agents two bills by private parties, and about

L.30 in bank notes. The bills were returned, but the money Dec. 7, 1830. was kept, and put to Harrison's credit; and on the 3d of February, the agents wrote to Sinclair, that 'we have to request that 'you will immediately on receipt put the caption in your custody in execution against Mr Harrison.' Sinclair failed to do so; and in May, 1829, Wilson and M'Lellan raised an action against him, and also against his brother, Duncan Sinclair, who was his cautioner, founding on the neglect to execute the caption, and concluding for payment of the balance of the debt, and L.50 of damages. The partibus on the summons bore that a counsel had appeared, and that it had been taken to see by Mr Robert M'Kenzie, W.S., as agent. The process, with the writs founded on, were borrowed by M'Kenzie; but having returned no defences, decree in terms of the libel was pronounced on the 31st of May, and a remit made to the auditor to tax the expenses. A correspondence then took place between the agents for Wilson and M'Lellan and M'Kenzie, in which the latter requested a copy of the account of expenses, and stated that he would be present at the auditor's, 'to attend to the interest 'of my clients;' and accordingly he was present at the taxation. A discussion afterwards took place between them as to the conclusion for damages, which it was agreed should be restricted to the actual disbursements; and a minute to that effect was lodged in process, and decree obtained accordingly.

In virtue of this decree, letters of horning and caption were raised against the two Sinclairs, and sent to M'Pherson, a messenger, by whom the amount of the sum charged for was remitted in March, 1822. Nothing farther took place till April, 1823, when an agent on behalf of the cautioner, Duncan Sinclair, applied to the agents for Wilson and M'Lellan to deliver to him the grounds of debt, diligence, and proceedings; and they in consequence sent the bill, diligence thereon, and the diligence raised on the decree conform to inventory, for which a receipt was granted on the 10th of April. In September thereafter, an application was made to them for an assignation to the diligence in favour of Duncan Sinclair; but this was declined on the ground that they understood that the debt had not been paid by him, but by M'Pherson the messenger, who, it was alleged, had incurred a liability for the debt. The agent for Duncan Sinclair having, however, stated, that the debt had been paid by Duncan Sinclair, and bound himself to 'guarantee Messrs Wilson and M'Lellan against any claim 'which may be made against them on account of the assignation being granted in favour of Mr Sinclair instead of Mr 'M'Pherson,' the assignation was executed, in September,



Dec. 7, 1830. 1824, by Wilson and M'Lellan. This deed contained a clause of warrandice in these terms: 'which assignation above written we bind and oblige ourselves, our heirs, executors, and successors, for our respective rights in the premises as aforesaid, to warrant to the said Duncan Sinclair and his foresaids, from all facts and deeds done or to be done by us in prejudice hereof.'

In virtue of this assignation, Duncan Sinclair raised diligence in his own name, and apprehended the endorser, Campbell, who was liberated on consigning the amount. This was paid to Sinclair, and the promissory-note, and diligence thereupon, delivered up to Campbell. The vitiation in the note, and the blunder in the protest, having been then discovered, Campbell raised an action of reduction, repetition, and damages against Duncan Sinclair, in which the Lord Ordinary, on the 27th of February 1827, reduced the note and diligence, and decerned in repetition, 'in respect that Duncan Sinclair cannot undertake to prove that the alteration of the date on the promissory-note in question was made before or at the time it was delivered by the grantor to the pursuer,' (Campbell.)

In the meanwhile Duncan Sinclair, on the institution of this process, had called on Wilson and M'Lellan to relieve him; and they having declined to do so, he raised an action against them, concluding, 1. For reduction of the decree pronounced against him and his brother Angus, and of the diligence following thereon. 2. For repetition of the amount of the money, which, in virtue thereof, he had paid to them. And, 3. For relief of the action raised by Campbell against him. The leading grounds of reduction of the decree was, that the promissory-note was vitiated, and the protest inept, so that the diligence raised thereon was illegal, and consequently the failure of his brother to execute it could not infer any liability against him, and that the decree had passed in absence. The conclusion for repetition was deduced as a consequence of the reduction of the decree; but it was farther rested on the ground that Wilson and M'Lellan 'were bound and obliged by having granted the foresaid assignation, containing the clause of warrandice before-mentioned, to warrant the foresaid sums and promissory-note, and other alleged grounds of debt assigned by them, to be truly due and free from all nullities and defects whatever.'

In defence, Wilson and M'Lellan maintained, 1. That the decree had not passed in absence; but, on the contrary, counsel and agent had appeared both for Duncan Sinclair and his



brother; that the agent had attended the taxation of the account of expenses, and that the conclusion for damages had formed the subject of a compromise. 2. That both Duncan Sinclair and his brother had had an ample opportunity, before paying the money, of making themselves acquainted with all the facts; and that the agent subsequently employed by Duncan was in possession of all the documents for several months before the assignation was requested, and was in the full knowledge of their nature, or must be presumed to have been so, at the time it was granted. And, 3. That the warrandice against fact and deed could not infer a liability for the vitiation of the note and the blunder in the protest.

To this it was answered, 1. That M'Kenzie did not appear for Duncan Sinclair, but for his brother, and had no authority to act for the former. 2. That the payment of the money had not been made voluntarily, but under the compulsion of diligence, and at a time when Duncan Sinclair (who was merely a cautioner) had not had an opportunity of seeing the documents, and was ignorant of the facts. And, 3. That although the clause of warrandice might not extend to the effect of warranting the solvency of the debtors, yet it necessarily imported that the documents assigned were legal and effectual.

The Lord Ordinary pronounced this interlocutor:—‘ Finds, ‘ that whatever implied obligation, in respect to warrandice, ‘ the defenders might originally have incurred, by taking ‘ decree against the pursuer, and compelling him to pay the ‘ full balance of their debt, with the expenses of diligence and ‘ process, the pursuer, by afterwards accepting from them ‘ an assignation to the debt and diligence, with warrandice ‘ from fact and deed only, has limited his recourse to the extent of this species of warrandice: Finds, that as the defects ‘ which have been found to render the grounds of debt and ‘ the diligence invalid, have not arisen from the fact or deed of ‘ the defenders, they are not liable in repetition; therefore, ‘ sustains the defence founded on the limited nature of the ‘ warrandice accepted of, assoilzies the defenders, and decerns, ‘ but finds no expenses due.’ His Lordship at the same time issued the subjoined note.\* This interlocutor the Court recalled,

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\* NOTE.—‘ The Lord Ordinary has found no expenses due, because he thinks the pursuer's a hard case. He conceives that the messenger could not have been subjected in damages for neglect, had it appeared that the document of debt was vitiated, or the diligence inept, and that when the defenders compelled the pursuer, as his cautioner, to pay up the full balance of the debt, with the expense of the

Dec. 7, 1830. and made a remit to the Lord Ordinary, who thereafter having reported the case, their Lordships pronounced the following interlocutor, on the 12th of February, 1829:—‘ The Lords, in  
 ‘ respect of the vitiation of the bill, and the illegality of the  
 ‘ protest, and diligence thereon, Find the defenders, Archibald  
 ‘ Wilson, James Jamieson, and John M’Lellan, jointly and  
 ‘ severally liable in repetition to the pursuer of the sum of  
 ‘ L.116, 4s. 9d. Sterling, paid by the pursuer to the defenders,  
 ‘ with interest since the 12th day of March, 1822 years, and de-  
 ‘ cern accordingly. And further, remit to the Lord Ordinary to  
 ‘ hear parties on the other conclusions of the libel for relief;  
 ‘ also find the said defenders, Archibald Wilson, James Jamie-  
 ‘ son, and John M’Lellan, jointly and severally liable to the  
 ‘ pursuer in expenses.’\*

Wilson and M’Lellan appealed.

*Appellants.*—1. The decree and diligence, by virtue of which the respondent paid the money to the appellants, have not been set aside. Till reduced, a decree in absence is as good and effectual as a decree in foro; but although the Court below have not set aside the decree and diligence, yet they have ordained the appellants to restore the money which they received by force of that decree. In point of fact, however, the decree was not in absence—counsel and agent appeared both for the respondent and his brother, and attended to their interests, the agent was present at the taxation of the account, and entered into a compromise relative to the conclusion for damages. The decree, therefore, was not reducible, and consequently the respondent was not entitled to repetition.

2. But supposing that the decree had been set aside, still the respondent is not entitled to repetition. The claim is made by him on the footing, that he was compelled to pay contrary to law. It is said, that his brother made no default, because the diligence was inept. This is just a plea, that the respondent paid under a mistake in point of law. But such a plea is irrelevant. A party who pays under a mistake in point of fact, or

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\* diligence, they were bound to assign to him the debt and diligence, with absolute warrandice. When he incautiously, however, accepted of an assignation, bearing the limited warrandice from fact and deed, the Lord Ordinary is of opinion, that, in terms of the doctrine laid down by Mr Erskine, B. 2, tit. 3, sec. 27, the implied obligation must be superseded by the expressed one.

\* 7 Shaw and Dunlop, 401.

in ignorance of a fact, may be entitled to repetition, provided he Dec. 7, 1830. has not barred himself by his acts and deeds. But a party who alleges that he paid under a mistake in law, cannot demand restitution. He is presumed to know, and is bound to know, the law, and therefore cannot plead ignorance. But independent of this, the respondent, or at least the party for whom he was liable as cautioner, had full opportunity of knowing the facts. The letters of horning and caption necessarily recited the protest, and consequently he must have seen its terms; and, again, in the action in which decree was obtained, all the writs libelled were produced. Besides, before paying the money, the respondent had it in his power to examine the writs; and before he got the assignation, they were in possession of his agent for more than a twelvemonth.

8. Although the appellants bound themselves only in warrandice from fact and deed, the Court below have found them liable in absolute warrandice. It is laid down by all the authorities, that, where a party accepts warrandice merely from fact and deed, he undertakes the hazard of all the defects in the right. But it is not and cannot be alleged, that either the vitiation of the bill, or the blunder in the protest, was the fact and deed of the appellants.

*Respondent.*—1. It is true that the Court have not reduced the decree, but the case is not exhausted, and it is competent, upon motion, for the Court still to do so. It is a simple decree in absence, against which the respondent is entitled to be repored at any time. It is not true that he made appearance, and even although he had, the decree was not pronounced on the merits, but *causa incognita*.

2. The diligence was illegal, both in itself, and as proceeding on a promissory-note, which could not be the warrant of lawful diligence. The respondent's brother therefore committed no default in not executing that diligence, and consequently incurred no liability for the debt. The respondent never saw the note nor the diligence till long after he had paid the money, and this payment was made not voluntarily, but by compulsion. He did not pay merely through a mistake in law—he paid on the representation of the appellants, that they had in point of fact a lawful ground of debt and lawful diligence. This was an error in fact, and not a mere error in law.

3. Independent of any clause of warrandice, the appellants were bound—not to warrant the solvency of the debtors—but *debitum sub esse*. They, however, expressly bound themselves

Dec. 7, 1830. to warrant against fact and deed, which implied a similar obligation; and as the diligence was raised at their instance, and under their directions, it was their fact and deed.

**LORD CHANCELLOR.**—My Lords, this case was argued at great length two successive days on the part of the appellants and respondent; it is an appeal from certain judgments of the Court of Session in Scotland, allowing of the repetition—as they call it—the payment back of certain monies which had been paid by Duncan Sinclair, the pursuer in the action, and the respondent in this appeal, to other parties, in consequence of a decree in a former action, that decree being in a suit brought against him by these parties for the recovery of damages against him, as the cautioner of his brother, Angus Sinclair, who had failed in his duty, it was alleged, as messenger, in the execution of a certain process. It is necessary that I should remind your Lordships, that, by the law of Scotland, a summary recourse is given upon a bill of exchange or a promissory note, which, by the law of England, can only be had in consequence of a judgment obtained in an action brought by the party entitled against the party liable. This follows, in England, the course of all ordinary actions. The plaintiff, who, we will say, is the holder of a bill of exchange, sues the acceptor, or the drawer sues the acceptor, or the indorsee sues the drawer. Here he has judgment upon the verdict, and execution issues as in any other suit, the bill having, independently of the mode of transferring the interest in it, no privilege except this—that, by the custom of merchants, extended, by statute, to the case of promissory notes, no consideration is necessary to be proved. In this particular—of the non-obligation to prove consideration, and a consideration being *prima facie* presumed—alone is there any peculiarity in bills of exchange and promissory notes, and actions thereupon brought, and judgment and execution thereupon had. In Scotland it is material to observe—very conveniently, as it has always appeared to those who have attended to the comparative merits of the two systems of jurisprudence, and very conveniently to those engaged in commerce, and tending to prevent the multiplicity of undefended causes (which are so numerous in this country on notes and bills, that Lord Chief-Justice Tenterden has lately, for the purpose of ridding himself from those inconveniences, appointed days for trying undefended causes and actions on bills of exchange and notes, assuming that they are, generally speaking, of that description)—in Scotland, very much to the benefit of suitors and those engaged in trade there, bills and notes have this further privilege attaching to the right of action:—A certain process of registration takes place, whereupon, in case of no suspension pursued to interrupt, a proceeding takes place, and a party may have his execution, which is the proceeding in England, after having obtained a verdict and a judgment in the action.

In the present case a promissory note had been dishonoured, and this course was pursued by the indorsee against the maker of the note; protest was recorded, and diligence raised thereon, and the messenger, Angus Sinclair, the brother of Duncan Sinclair, the defendant below in the first

action, was intrusted with the execution of that diligence. The warrant Dec. 7, 1830. of the messenger who executes the process must bear upon the face of it that he has a legal authority. Now, it appeared, when it came to be looked into, that the notary's protest had this blunder or defect—that while the promissory note which was payable at three months, and drawn on the 25th of July, and became due (including the three days of grace,) on the 28th of October, the notary's document, the protest, purported to make it payable on the 28th of July, and that the process was thus wholly illegal and inept, and that the messenger, in executing that process, would have been guilty of a wrong, and made himself liable to an action for false imprisonment. Nevertheless, the ground of the action against Duncan Sinclair was conceived to be correct, he being cautioner or security for his brother, the messenger. He, therefore, when he was complained of in that action, suffered the decree to go out in absence, being not then aware, any more than his brother, the principal, of the defect of the process, which justified him in not executing it, and which turned, what appeared to be his fault, into the only correct conduct to be pursued.

Much litigation has arisen, both in the Court below and here, upon this material point—the nature of that proceeding against Duncan Sinclair. It is on one side stated to be a decree in absence; it is on the other side denied to be a decree in absence. This is most material. A decree in absence, by the law of Scotland, is perfectly different from our laws in this respect, and framed on principles which have been clearly established by an uniform train of decisions, and wholly unquestioned on either side, but which principles, I will venture to say, are the most extraordinary that are to be found regulating the practice of any civilized country. In that respect there seems to be hardly any bounds to the right which a defendant has of opening a proceeding, by simply not appearing after a certain time. I allude to these things because the distinction is of the highest importance, and because, in referring to the laws of both countries, it is our duty to take that which is good in the law of Scotland, and to introduce it, by prudent changes, into our own; and it is our duty to point out what is bad in the law of Scotland, that it may, by a judicious course of amendment, be remedied. I therefore gladly seize such opportunities, when I see my way clearly, and when I am aware that there is no difference of opinion among my brethren at the bar. This being the case at present, I state the great difference in the Scotch practice in this respect; for in England, when a man comes into a Court as a plaintiff, and has given due notice to the defendant to appear—if he has not given due notice, and he has done that which may prejudice the defendant, the latter can relieve himself; but if he has had due notice, and does not appear, he has himself to blame—the plaintiff is not absolved, by the defendant's absence, from the necessity of proving his case, although it becomes an easier matter in all probability. But he proves his case and obtains his verdict; and that verdict, and the judgment proceeding upon that verdict, can no more be set aside than if the defendant

Dec. 7, 1830. had appeared and defended the action in open Court. But it is otherwise in Scotland. A person, before what is called 'litiscontestation' takes place, may be in Court, and may withdraw from the suit, until the act of 'litiscontestation,' unless there be what is called a homologation by himself or an agent duly qualified—which homologation is an adoption of all that has been done before, and operates, by relation back, as if he had been present and not absent. Unless, in these two cases, either his appearing after 'litiscontestation,' or his homologating, he may be afterward let in to state his reasons why that judgment should not stand against him.

My Lords, in the present case I have had some difficulty, in different parts of the argument, in ascertaining whether there was a decree in absence or not. I am satisfied that here there was such a decree in absence, as this party might seek to have himself reponed or restored against. Nevertheless, it is most singular to observe, that, in the Court below, certain things were alleged on the one side and denied on the other, which, if an issue had been taken and tried upon them, would have decided this question—whether there had been a decree in absence or not. In the second article of the condescendence, it is stated that M'Kenzie actually attended, and acted as the agent of the defenders at the auditing of the account—that he was present at the taxing of the costs in the Master's Office, as we should say in our Courts. It is said that he not only did so, but that he wrote to require that the decree might be altered in his client's favour, and added, that to a decree to this effect his client would make no opposition; and, therefore, they contend, it is quite immaterial whether it was a decree in absence or not. Now this is articulately denied on the other side. They say that he had no authority, and that Duncan Sinclair was not bound by Mr M'Kenzie's acts, either in admitting or correcting the decree, or promising to take no advantage of the absence. Now, if this had been tried in a regular way, and it had been found that M'Kenzie had authority, there was an end of the question. I agree that, if it had been found the other way, that would not have been the case—but that may be the case with many things. Supposing a plea of the statute of limitations, and an issue being taken on it, that it is decided one way that the claim was *supra sex annos*, that is, fatal to the action; but if it is decided the other way, that it is *infra sex annos*, then comes in the defence of a release made. These are good and material issues, and may be tried daily in the Courts of Westminster Hall. Now, what I would humbly submit to your Lordships is, that the Court of Session ought to have sent that issue to be tried; because, when we find it asserted on the one side, and denied on the other, the assertion is no reason for the fact being presumed to be correct. The Court of Session have not decided that point, and we are left to reason upon it. I should much regret having to send it back, and thus still farther to protract this suit, and to increase the expense of the parties, who have already incurred considerable costs, where the amount in dispute is small; though I might otherwise, in a case of much larger amount, think it fit to advise your Lordships to send it back, with some intimation of what appears to me to be the error of the Court.

Then, my Lords, we are to find our way to the truth of the case, as if Dec. 7, 1830, neither of these facts existed—as if Mr McKenzie had no authority, and the parties had no knowledge of the proceedings on the other side. Then, how do the Court decide? Sinclair paid the money under a mistake in point of fact. As soon as he discovered the error, he brought his action—first, to be restored against the decree; secondly, for repetition of money paid by him under a mistake, against the parties to whom it was so paid. The action is competent, if it is taken to be a decree in absence, because it is admitted that there was an error in fact under which Sinclair paid for the default of his brother Angus, Angus having made no default, and Duncan Sinclair having paid upon the supposition that he had made default. Supposing the judgment to have no other effect, it being a decree in absence, it is said that Harrison—the party against whom the act had been executed, or not sufficiently executed by Angus—paying part and not the whole, is sufficient proof that Angus might have obtained the whole of the money by due diligence; but, non constat, that Harrison did not refuse to pay the residue when he discovered the defect of process—therefore I put that out of the question; but Sinclair brought his action, and recovered under the interlocutor I am about to read to your Lordships. And if the facts stood, as I have stated, and there were no more facts in the case, I should have no doubt whatever that the decree was good; but I shall presently show your Lordships there are other facts in the case which make it perfectly clear the other way, and that it is impossible for me to advise your Lordships to affirm any part of this decree. In the first place, it is admitted on both sides, that the decree cannot stand in the form in which it has been pronounced: First of all, the summons is formal and accurate. It treats the judgment in absence as a nullity, and prays for the restitution of the sum paid, as paid under mistake, and without any judgment existing. It is admitted on all hands, that that is the mode of proceeding,—that you must treat the judgment as a nullity, and begin by reducing or setting aside that judgment. As long as it stands unreversed, it is a warrant for that which was done under it,—as long as it stands unreversed, it is impossible to say that the party, however wrong in paying the money—however much he paid the money under mistake, and in his own wrong,—has a right to recover it back, standing the judgment; and, accordingly, the summons, which brought the matter into Court, is framed most technically and formally. It seeks to have the judgment in absence set aside, which is right; and then, praying the setting aside of that judgment, it seeks to have the repetition of the money paid under it.

Now, my Lords, with the judgment before them for payment of this money, what do the Court do? The learned counsel for the respondent, to whom I put it, whether it was possible, according to the practice of the Scotch Courts, that any other course could be taken than that I took the liberty of pointing out, first, to reduce the judgment, and then, if the judgment was reduced, as a consequence to repay the money, candidly admitted that it was impossible that any other course could be followed. Now, how



Dec. 7, 1830. did the Court proceed on advising the case?—They unanimously concurred in pronouncing the following judgment:—‘Find the defenders, Archibald Wilson, James Jamieson, and John Maclellan’ (they were the pursuers in the former action), ‘jointly and severally liable in repetition to the pursuer of L. 116, 4s. 9d. sterling, paid by the pursuer to the defenders, with interest since the 12th day of March, 1822 years, and decern accordingly; and further, remit to the Lord Ordinary to hear parties on the other conclusions of the libel for relief; also, find the said defenders, Archibald Wilson, James Jamieson, and John Maclellan, jointly and severally, liable to the pursuer in expenses; appoint an account thereof to be given in, and remit the account to the auditor to be taxed, and to report.’ Thus omitting the first conclusion of the libel, (and without dealing with which they could give no answer to the summons; for it could not be an answer to all the proposition,) they have jumped to the last stage instead of the first, and have given the repetition before the decree was reduced—they have actually decreed for the remedy, the decree standing in full force with all its authority. It is agreed on all hands that that cannot be done.

Next, my Lords, the reason on which the decree is granted cannot stand, because your Lordships will see that the validity of the bill, in respect of which Angus Sinclair was executing the process of diligence, is quite out of the question. Who ever heard that a sheriff's officer, or other person intrusted with the process of the Court, is bound to look into the validity of the bill, and of the diligence issued out? And yet the Court actually proceed as if the vitiation of the bill was a conclusive argument in the case in determining the merits of the question, the conduct of Angus Sinclair, the messenger, charged with the execution of the process, and the liability of his brother, the cautioner, against whom, for his default, this action is brought! ‘The Lords, in respect of the vitiation of the bill, and the illegality of the protest and diligence thereon, Find the defenders, Archibald Wilson, James Jamieson, and John Maclellan, jointly and severally, liable in repetition.’ As I have already stated, my Lords, the decision is wrong, *ex concessis*,—admitted to be so by the respondent himself—in respect of its not giving reduction, but at once giving the consequence of that for which he proceeded, namely, the repetition. But the reasons on which that decision is founded are, if possible, still more manifestly wrong, because the Court consider the vitiation of the bill to be one ground, as well as the illegality of the diligence for discharging the officer for his neglect. My Lords, it is not immaterial to remark this error; because, if I had advised your Lordships to affirm this judgment, the case would have stood on the record of the Court of Session, and have been acted on, and cited at your Lordships' bar, as a proof that, by the law of Scotland, a messenger has a great deal to do with the ground of the action on which he is executing the diligence; for it would at once have been stated, that this House had fallen into this view of the Scotch law, and of the Scottish mode of decision: Therefore, had I recommended to your

Lordships to affirm, I should have felt it my bounden duty to have proposed to remit to the Court below to erase the reason, and to proceed to the reduction, before they gave the repetition, which can be the consequence only of that reduction.

But, my Lords, there are other circumstances in this case, and I shall only refer to one or two, which make it perfectly clear that there can be no affirmance of any part of the decree. When a person pays money under a mistake, he has no right to recover that money, unless where it was a mistake in point of fact. If he pays by mistake in point of law, there was at one time a little doubt in Westminster Hall; but it is now settled, that he has no right to recover it back again. Since the case of *Brisbane v. Dacres*\*, in which Sir Alan Chambre, a most learned Judge, differed from the rest of the Court, holding that an action lay for money had and received, to recover money paid by mistake in point of law; and the other judges holding that it could not, it has been considered an established point that the mistake must be in the fact. But, my Lords, there is one circumstance which would be fatal altogether to such an action. If the party who has paid the money is under an unavoidable mistake, if the mistake is no fault of his, then he may have it back again; but, if he has himself to blame—if he himself paid the money, ignorant of the fact, and had the means of knowledge of the fact within his power—and did not use those means, he shall in vain attempt, by means of proceeding at law, to have that repaid to him. That has been decided in our Courts repeatedly. It is a rule founded in the strict principles of ordinary and universal justice, which will never allow a man to take advantage of his own wrong,—or, what is the same thing, of his own gross negligence. The ground of action being ignorance, it must be unavoidable ignorance,—it must not be ignorance through his own fault, of having shut out the light by wilfully closing his eyes. That is the principle which runs through the whole of our law. I have stated this principle because it applies to the Scottish law as well as to the English, and it must apply to the administration of justice under every system of jurisprudence. I do not find it alleged at the bar, that it is not the law; but the fact is attempted to be denied, and denied with no success, in my opinion. Duncan Sinclair had the papers, including the protest, in his possession for twelve months. The agent of this man had some of those papers in his possession; but he having in his possession the papers which contained on the face of them the error—for it is an error, *ex facie*—having in his possession the document containing the bill in one part, and a blank in the protest in the other—he chose to remain in ignorance. One can never tell whether a man knows or not;—he may know, and tell you he did not know; but how can any one know that Duncan Sinclair had not read this over, again and again? My Lords, there are several other views of this case, which I will not trouble your Lordships with going

\* 5 Taunton, 143.

Dec. 7, 1830. through. They all concur in imprinting on any mind the same impression, that it is impossible for me to advise your Lordships to affirm this judgment.

As for the observations made in the Court below, treating the promissory note as of no value, because, through the error in protest and diligence, it had lost the privileges of summary execution, these are plainly without foundation. It was good for all not actually paid on it, although it lost those privileges; and I now humbly move your Lordships that these interlocutors be reversed.

The House of Lords accordingly ordered and adjudged that the interlocutors complained of be reversed.

*Appellants' Authority.*—2 Ersk. 3. 27.

*Respondents' Authorities.*—Riddell, 9th February, 1766. Ferriar, 16th May, 1822, (6 Shaw and Dundas, 818.)

J. M'QUEEN,—S. S. BELL,—Solicitors.

No. 47. JOHN M'TAVISH, Appellant,—*John Campbell—Wilson.*

JAMES SCOTT and OTHERS, (M'KENZIE'S TRUSTEES,) Respondents,—*Denman, Att.-Gen.—James Campbell.*

*Cautions.*—Circumstances in which it was held, (reversing the judgment of the Court of Session,) that cautioners for a tenant, who had stipulated that the landlord should exercise his right of hypothec before calling on them to fulfil their obligation, were discharged.

Dec. 7, 1830. M'KENZIE of Dundonell, who held a lease of the farm and house of Seabank, near Inverness, agreed to sublet them to Mrs Fraser, from May 1818 to May 1822, at the yearly rent of £136, payable at Martinmas yearly, on condition of caution being found for the rent. The appellant M'Tavish, writer in Inverness, and two other parties, thereupon granted an obligation to 'guarantee the rent of one hundred and thirty-five pounds, offered by Mrs Jean Fraser, for Seabank, in manner stated in her missive, the principal tacksmen Dundonell (M'Kenzie) being bound to exercise his right of hypothec before calling on us to fulfil this obligation.\*

1st Division.  
Ld. Alloway.

Possession was taken; but the rent not being paid at Martinmas 1819, M'Kenzie applied for, and obtained on the 30th No-

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\* Mrs Fraser's husband, Captain Fraser, was alive, but he was insolvent, and in consequence all right on his part to the lease was excluded.

venner, a warrant to sequester Mrs Fraser's effects, which was Dec. 7, 1820 executed.

Nothing farther was done till 3d February, 1820, when M'Kenzie's agent wrote to M'Tavish in these terms:—'As one of the sureties to Dundonell for the said back rent due by Captain and Mrs Fraser, I beg leave to inform you, that sequestration has been executed against them; and as this step has not produced payment, I have to request you will, on receipt, settle the rent due at Martinmas last, being L.135, exclusive of interest and expenses. If you and the other cautioners desire it, my constituent will give an assignation to his right of hypothec.' To this M'Tavish answered,—'In reply to yours of yesterday's date, addressed to me as one of the sureties to Dundonell for the Seabank rent, I beg to say, that I do not consider myself bound as such. Some time in May 1818, an offer was made by Mrs Fraser for Seabank, and Messrs Frasers and I did consent to guarantee the payment of the rent, on condition of that offer being accepted. It was not accepted of by Dundonell, but a new bargain was some time thereafter made by Mrs Fraser, to which the intended sureties were not parties;\* besides there was a stipulation in our letter, which, if the transaction had been entered into in terms of it, would protect the cautioners from any demand for payment of rent until the principal debtor was discussed. For these and other reasons, which I may explain to you verbally, I do not consider myself, in any manner of way, connected with the payment of the rent referred to in your letter, and Mr William Fraser, who is in town, is of the same opinion, in so far as he may be interested.'

Although a warrant of sale might have been got on 6th December 1819, M'Kenzie did not apply for it till 26th August 1820, when it was granted. A sale took place on 16th September, but in consequence (as was alleged, of the absence of bidders,) only a small part of the effects was sold; and after deducting taxes and expenses, the whole sum realized was about L.25. A renewed warrant of sale was craved on the 5th October, but being resisted by Captain Fraser, it was not obtained till 21st March 1821; and on the 10th April following, the officer reported that no part of the sequestered effects were to be found. The produce of the partial sale was L.81. In the meanwhile, Captain Fraser had been imprisoned for debt—a circumstance known to M'Kenzie.

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\* This plan was afterwards abandoned.

Dec. 7, 1820. With reference to the rent due at Martinmas 1820, M'Kenzie, on the 4th of October, obtained a warrant to cut down, and secure the crop of 1820—and on the 7th of the same month, he got a warrant of sequestration, in virtue of which, a large quantity of oats and barley, besides turnips and potatoes, some farm stock, and household-furniture, were sequestrated. Thereafter, on 21st January 1821, he applied for and obtained warrant to sell—in virtue of which he sold, on the 13th March, effects; but the expenses exceeded the proceeds, part of the effects having been (as was alleged) carried off. The next year's rent, due at Martinmas 1821, was also not paid, and M'Kenzie did not apply for warrant to sequester till January 1822, when it was granted, but he did not execute it till the 11th of February; nor did he apply for and get warrant to sell till the 11th of May. It was ordered to be executed on the 28th, but the officer reported, no effects—these having been (as was alleged) abstracted.

During these proceedings, M'Kenzie, founding on the act of sederunt 14th December 1756, and alleging that Mrs Fraser was more than one year's rent in arrear, raised an action of irritancy and removing, in which he obtained decree; and Mrs Fraser was ejected on 9th March 1822. To this action the cautioners were not called as parties.

M'Kenzie thereupon entered to the farm; and, by a transaction with his landlord, ceded possession in the course of the same year.

He then brought an action before the Court of Session against M'Tavish and the other cautioners, for payment of the balance of the rents due at Martinmas 1819, 1820, 1821, and 1822. The cautioners pleaded in defence, that M'Kenzie, by his own conduct, had discharged them, seeing that he had not duly exercised his right of hypothec.

The Lord Ordinary found, that 'by the letters of guarantee the pursuer was bound to use his right of hypothec before calling on the defenders to fulfil their obligation; that the defenders are entitled to insist upon the pursuer's having bona fide exercised this hypothec for their security; and that they will be entitled to be relieved from any part of the rent for which the pursuer had not used the ordinary means of securing and rendering it effectual under the hypothecation,'—and appointed the cause to be enrolled, that these principles might be carried into effect. This interlocutor was acquiesced in by all parties. Thereafter, his Lordship, 'In respect that the pursuer failed for the first three years to exercise his right

‘ of hypothec, in the effectual manner which, from the condi- Dec. 7, 1830.  
 ‘ tion in the letter of guarantee, he was bound to do ; and in re-  
 ‘ spect of the proceedings before the Sheriff, by which Captain  
 ‘ and Mrs Fraser’s lease was irritated in terms of the act of  
 ‘ sederunt 1756 by the pursuer, Mr M’Kenzie, and they were  
 ‘ removed from the possession, without the cautioners being  
 ‘ even called in the process, and the pursuer entered into pos-  
 ‘ session of the farm, cultivated the same, and made an arrange-  
 ‘ ment with the landlord, without the concurrence, knowledge,  
 ‘ or approbation of the cautioners ; assolized the defenders.’  
 M’Kenzie having reclaimed, the Court, after ordering conde-  
 scendence and answers, (but not followed by proof,) altered the  
 interlocutor complained of, and found the defenders liable, in  
 terms of the libel, under the deductions there specified, and re-  
 mitted to the Lord Ordinary to ascertain the amount.\*

M’Tavish appealed.†

*Appellant.*—The right of hypothec imports not merely a general lien, but also the capability of being converted into a real pledge, or a specific security, by warrant of sequestration, and being rendered productive by sale. It was on the express condition that M’Kenzie should make this right effectual, that the cautioners agreed to be liable, if it proved unavailing ; but instead of doing so, he neglected the execution of it in the usual manner. It is not sufficient to say, that he obtained and executed warrants of sequestration, or even warrants of sale. It was his duty to have done so with due diligence ; whereas, by his dilatory proceedings, he, according to his own statement, permitted the effects to be carried off. Besides, he allowed the cautioners to remain ignorant of the responsibility which, according to his views of their liability, they were each year incurring. Had they been informed of the real state of matters, they could have insisted on his duly exercising his right of hypothec ; or by assignation to his proceeding under that right, they could have secured themselves by measures against the tenant. Even if they were liable for the three first years, it is clear they cannot be for the fourth, because the tenant was removed from the possession by M’Kenzie himself.

*Respondents.*—The argument of the appellant rests upon a

\* 5 Shaw and Dunlop, p. 597.

† In the meanwhile M’Kenzie conveyed his estate to Scott and others, as trustees for creditors, and after the appeal died.

Dec. 7, 1890. misconception of the true nature of a landlord's right of hypothec—or the duty incumbent on him, either in relation to the tenant, or a cautioner. The landlord while he protects himself, is bound to protect the tenant; and the cautioners cannot shake off their responsibility, because the landlord will not, in order to save them, ruin the tenant. The landlord is entitled to act with reasonable discretion; if he deals with all parties in perfect bona fides, that will protect him. It never was thought of, that a landlord was obliged to carry the right of hypothec to extremities. It is enough if he sequesters—if he exercises his right so as to exclude other diligence. If the cautioners wished severe measures, they might have taken an assignation from the landlord, and proceeded as they saw best under it. In point of fact, however, they would have little benefited themselves—clearly for the second and third years they would have recovered nothing. When the tenant left possession, the cautioners were not kept in the dark. On the contrary, they were told of the tenant's incapacity to pay, very soon after the first year's rent was due, and they ought therefore to have been on the alert.

LORD CHANCELLOR—My Lords, though I confess, after attending to the arguments of the learned counsel for the respondents, who have placed the case on the only grounds on which it can be rested, my mind does not entertain any considerable doubt with respect to the judgment I ought to recommend to your Lordships to give upon this appeal; yet, as that judgment, in the only way in which the subject now presents itself to my mind, would be reversing the judgment of the Court below, I think I shall best discharge my duty by adopting the course I have followed since I have had the honour of sitting in this House—namely, delaying to offer that advice to your Lordships, until I shall have had an opportunity of deliberately looking again into the whole of the case for the respondents, and the reasons for the judgment. The right of hypothec is nearly a convertible term for a right of pledge. It is, in its nature, a species of pledge. By it, in fact, the party obtains a title to the possession of the matter to which it attaches. In the mercantile law, we talk of hypothecation; and in the civil law also. It is an expression used in all foreign laws. A ship, being hypothecated for certain engagements which have been contracted, wherever it goes, carries that hypothec about with it, and may be followed, and the remedy made effectual in the hands of any person who has got possession, provided it is not obtained in a way to defeat that original title. But the hypothec of the landlord in Scotland appears to be of a nature exceedingly strong and very peculiar, arising from the former state of that country, and from the fact of the landlords having made the laws, and not the tenants, and still less the traders, who,

probably, had no existence at the origin of the law. The landlord has his Dec. 7, 1880. hypothec upon the corn and grain of the year, if any rent remains unpaid; and that corn is not released from the hypothec unless it is sold in market overt, and purchased by a person in bulk; for that appears to be the doctrine. A sale by sample, we are told, will not do, but sale in bulk to a bona fide purchaser, without notice of an arrear of rent, can alone protect the purchaser from either being obliged to send back the corn—for it can be followed in substance—or, at all events, paying the price to the landlord. This, therefore, is the nature of the landlord's right of hypothec. He has the right of hypothec in him, whether he has done anything to make it effectual or not. He may exercise the right of hypothec (which is the ground upon which the case of the respondents appears to proceed) as having this right in him, without making it effectual to the full extent of obtaining the fruits of that right. But it is clear that the condition in the guarantee in the present case goes a great deal farther; for it says, unless the landlord shall first exercise his right of hypothec, we, the persons making the guarantee, shall not be liable as cautioners; and the words clearly import in themselves a restriction, that the right of hypothec must be exercised before the rent is demanded of them, and that rent can be demanded only for the balance remaining unpaid, after the landlord shall have exercised a full right of hypothec, and after the exercise of that right shall have enabled him to obtain so much as he can under it. If, having exercised that right, he obtains nothing, then the cautioner is liable for the whole; and, if he obtains the whole, the cautioner is liable for nothing. The very force of the words, "the landlord being bound to exercise his right of hypothec before calling upon us to fulfil this obligation," appears to me distinctly to import this as the substance and effect. That being the case, I certainly incline, at present, strongly to advise your Lordships to reverse this judgment; nevertheless, for greater security, I shall carefully look into the cases. They do not appear to me to have any reference to the construction of an express condition. The cases for the respondents turn on what may be called the common law doctrine between an obligee and obligor; this is a case between a landlord and a cautioner. Whether or not he is bound, first, to discuss the principal before he goes against the surety, is another question, with which we have nothing at all to do in this case; because, here is an express condition. Both parties have bound themselves by a condition, which is adjoined to the cautionary by the guarantor of the condition, and which has, by the acceptance of the obligee and the guarantee, limited his right against the guarantor, because he has accepted it with that modification, on the part of the person giving him the cautionary; so that here the rule of the case is the express condition of the obligation, and the construction of that condition is the only question for the consideration of the Court, upon which no light whatever appears to me to be thrown by cases arising in circumstances of a totally different nature, and where there was nothing but the common law right under consideration—of



Dec. 7, 1830. recourse against the guarantor—without any express condition adjoined.

These being the grounds on which I shall probably advise your Lordships to consider this case, (wishing not to proceed further into this matter until I shall have examined more minutely the grounds on which it may be supposed this judgment was given in the Court below,) I shall now forbear urging your Lordships to come to any conclusion, that I may have time to make that farther investigation. But, should I find nothing to alter the opinion I have come to, I shall, on a future day, simply propose the reversing of this judgment, omitting, on that occasion, adding any reasons, unless any matters should, in the interval, occur to me; as I shall now have given the reasons on which it appears to me the determination of your Lordships should proceed. I think the fact of the early interlocutor of the Lord Ordinary not being appealed from, is not immaterial to this case;—that stands, and that certainly did raise a principle quite inconsistent with the subsequent interlocutors; because, when they want to apply that interlocutor to the case—what do they do? They make a new interlocutor, departing from the former, and proceeding on a totally different view of the subject, recognising a different principle entirely, and one quite inconsistent with that of the Lord Ordinary, in the view he took of the question. I think that is a very singular state of things in this cause; and that, if it were to be sanctioned by your Lordships, it would, in after times, be drawn into a precedent in other cases on the construction of an obligation, though there is a specialty on which it really turns. The parties who complain of the decision can obtain a reversal alone of the further interlocutors—the first standing unappealed from; so that, if the final decision were affirmed by this House, there would stand with it on the record another judgment unappealed from, and therefore final, proceeding on a wholly different ground, irreconcilable with it, and deciding the opposite way. These are the grounds on which I shall, on a future day, simply recommend the reversal of these interlocutors, unless I see that there is ground for adding any observations, or altering the course that I have proposed. I have thought it more convenient to proceed thus; because I shall not put the parties to the expense of the counsel attending; and my addressing your Lordships now enables the counsel to know the grounds on which I proceed, which are not always very distinctly communicated to the learned counsel when they are not present. I now move your Lordships to adjourn the further consideration of this case.

LORD CHANCELLOR.—My Lords, with respect to the case of *Mactavish v. Scott*, I may preface the very few observations with which I propose now to trouble your Lordships—having stated my opinion upon it already,—with saying, that having had an opportunity of looking again into the pleadings, it is quite impossible that the judgment can stand, even if, as far as regards three of the years, it were right in substance. Your Lordships will recollect, that it was an action against a surety by a landlord, for the non-payment of rent by his tenant. Four years are in arrear. What-

ever is said respecting the three years, it is impossible to affirm that Dec. 7, 1830. judgment respecting the fourth year; and stating this, I will beg to remind your Lordships of the situation in which that fourth year stands. The defender in the action below, Mactavish, was surety for the tenant, under a guarantee, of May 1818, in these terms :—‘ We, the undersigned, do hereby guarantee the rent offered by Mrs Jean Fraser,’ of so and so, ‘ the principal tacksman,’ Dundonell, being bound to exercise his right ‘ of hypothec, before calling upon us to fulfil this obligation.’ Now, what did the principal tacksman do? Did he exercise his right of hypothec or not? That is the whole question, buried in a mass of papers of twenty folios on one side, and eleven folios on the other, ‘ which might very well have been stated in two folios on each side. There was no one disputed fact which any lawyer in Westminster Hall would not have stated in half a folio—which any Court of Westminster Hall would have said it required more to state—and which any Court in Westminster Hall would not at once have decided against the decision which has been pronounced in this case. My Lords, I say not this invidiously towards the Court below, and those most learned and accomplished judges who compose it; for where the question which has arisen is one of Scotch law, founded on the peculiarities of that system of jurisprudence wherein it differs from our own, I have always been, and ever shall be, found the last person to recommend to your Lordships lightly to deal with the authority of that Court. I lately recommended to your Lordships—in affirming a judgment complained of—to act contrary to the reason of the case—contrary to all the analogy of English law proceedings, because I found it a case of Scotch pleading, and Scotch practice; and although one Judge differed from his brethren, after having held the same opinion which they retained, I did not feel it to be proper to propose to your Lordships to set aside the decision of the majority;\* and the same with regard to the question as to the effect of the omission of the bailie’s name in an instrument of sasine.† But, my Lords, this is not a question peculiar to Scotland—it is a question of the construction of a guarantee, and is precisely the same question in Scotland as it would have been in the Court of King’s Bench, or the Court of Common Pleas. The question is simply this—Whether the landlord was bound to exercise his right of hypothec, before he called upon the surety? I apprehend, my Lords, that the landlord has only a right to enforce against the surety payment of the balance—that he must get, by all means in his power, as much as he can, himself, under his right of hypothec, which is a large right in Scotland—a much larger right than is possessed by a landlord in England; for he can follow goods when sold to bona fide purchasers for a full price. With this large right which he possesses, it is his duty to enforce his own remedy, before calling on the cautioner, the surety; and he can only call upon the surety to pay the balance. I will venture to say, that if your Lordships were to take any ten lawyers accustomed to the legal construction of instruments, and ask them to construe this instru-

\* Cogan v. Lyon, ante, p. 391.

† Morton v. Hunters and Others, ante, p. 379.

Dec. 7, 1830. ment, there would not be one found who would put upon it a contrary construction. What is the construction contended for on the part of the respondent? That he was only to take it and go to the Sheriff and get a warrant of sequestration, and so seize the goods, and then allow them to be taken away by the tenant, and used. Being quite secure, he allows the tenant, who may be a friend of his own, to go and consume the produce, and eat up the crops, and sell the farming tools. Having a solvent cautioner, he seizes L.500, and, being lulled by his having the cautioner, as he thinks, to retire upon, he only sells to the amount of L.25, or thereabouts, for the first year's rent, which is L.135, and rests there, having ample security in his hands; and afterwards he proceeds for the balance of the L.135 against the cautioner—where is this to end? If it is allowed he may do it for one year, why might not he do it for two, three, or four? Is he to be permitted to allow every thing to be carried away, and never take any remedy, and then, when the whole is driven off and sold through his own laches, to come for his remedy against the cautioner? I ask your Lordships, whether that is the right construction of the word, 'the principal tacksman being bound to exercise his right of hypothec?' Surely that is not, in common sense or common reason, construction of the instrument, or any thing like it. What did Dundonnell do? He took what I have mentioned for the first year. He took something for the second year, and sold. For the third year he took nothing, for he had, by his laches, debarred himself of the power of taking any thing; for the farm was stripped and dismantled. What did he do the fourth?—nothing. He goes and ousts the tenant, and takes possession under the act of sederunt, and, upon an arrangement with the landlord, cedes possession. That act of sederunt is said by the gentleman at the Bar, to be merely explanatory of the common law. I cannot help thinking, however, that the Court of Session there may have exercised some quasi legislative power; and my reason is this: By the law of England, the landlord had no such recourse until a late period. He might sell his distress under the statute of William, which he could not do before. Before the statute of William, he could distrain without a warrant of the Court, as is required in Scotland, but he could not sell. It was only a pledge he possessed himself of by his distress. In England they may sell within five days, and in Scotland they sell within six days. A statute passed early in the reign of George the Second, some time before this act of sederunt—and that raises in my mind a suspicion of the Court of Session having passed this act of sederunt, in the exercise of a quasi legislative function, the limits of which have never been very nicely defined. They appear to have exercised this power in a half-enacting and half-declaratory shape, introducing into Scotland that which had been introduced into England by the statute of George the Second. This is a mere suspicion; it may be so or not, but, by that act of sederunt, it is conceived there is a power of summary removal. The fourth year the tacksman took possession in a summary mode. What did the Court of Session do? They have not only held the tenant's cautioner liable to pay the last three years' rent, but they have actually held him liable to pay the fourth year. Now, was it ever supposed that a cautioner could be liable when the principal is not liable? It must be

an oversight of the Court below. They certainly have not attended Dec. 7, 1830. to this, that the cautioner is liable only subsidarie, and that if you cannot sue the principal, you cannot sue the cautioner; nevertheless, they have found him liable for the whole four years.—This case was argued for the respondents by the Attorney-General, but he and his learned coadjutor hardly contended for that; and, at all events, that cannot stand beyond the reasonable and consistent view of the subject, but on the grounds I have taken the liberty now to state—and those I stated before. Unless the landlord has exercised the right which he possesses, he cannot have a right to call upon the cautioner. He has his recourse against the goods—he takes possession of them; but how does his taking possession of the goods put him into a different situation from that in which he would have been, if he had not taken possession? It only prevents their being taken away *brevi manu*, but he has the same remedy against the goods, whether they are in his possession or not. He may follow them for unpaid rent, and if necessary, he is bound to do so. He is bound to exercise his right of hypothec before he calls upon the cautioner to fulfil his obligation. I have stated my opinion to your Lordships, as to the construction you are bound to put upon these words. Is this construction inconsistent with the law? Not at all; nor is it inconsistent with the cases which have been decided, which were cases as to the common law. It is not necessary here to enquire, whether you must discuss the principal before you come upon the surety; for there was in none of those cases an express condition; and *pactum tollit legem*. This is a pactum by which parties are bound—in those cases there was no pactum at all. My Lords, upon these grounds of law, upon which I conceive this case must stand, I feel it my duty to recommend that your Lordships should reverse this judgment, applying the principles which, in my opinion, the Court is called upon to apply to the case. Some of the learned judges have thought Mr Mackenzie was very ill used; but if any body was ill used, it appears to me it was the surety. Even if there had not been this express condition, I should have been inclined to think that your Lordships must have decided in favour of the surety, and against the principal, but this is wholly immaterial in the present case, and need not be decided either way; because the express condition by which the parties bound themselves is the law of the case—by which both are bound, the landlord and the cautioner. The interlocutor of the Lord Ordinary is on the right principle—that therefore stands unimpeached. With respect to the other interlocutors, I would humbly submit to your Lordships that they be reversed.

The House of Lords accordingly ordered and adjudged that the interlocutors complained of be reversed.

*Respondents' Authorities.*—M'Millan, Jan. 21, 1729. M'Queen, June 11, 1811, (F. C.) 3 Ersk. Inst. 3. 66. 2. 6. 62.

J. M'QUEEN—MONCREIFF, WEBSTER, and THOMSON—  
Solicitors.

No. 48. GEORGE DUNLOP and Co., Appellants.—*Spankie—Wood.*

EARL and COUNTESS of DALHOUSIE, Respondents.—*Lushington—Robertson.*

*Landlord and Tenant—Sale.*—Held (affirming the judgment of the Court of Session,) 1. That a bona fide purchaser from a tenant of part of his crop, which has been delivered and paid for, is liable in second payment to the landlord where the rent of that crop has not been paid; and, 2. That the purchaser is not protected, although the contract of sale be made by sample in public market.

Dec. 7, 1830.

1ST DIVISION.  
Lord Core-  
house.

THE respondents let the farm of Seggarsdean, in the county of Haddington, to Robert Amos, at a rent of L.400, payable in equal parts, on the 2d of February and 1st of August yearly. Amos died on the 21st of September, 1825. The rent for the crop of that year was payable on the 2d of February and 1st of August, 1826. On his death, the management of the farm was assumed by his son and heir, with the assistance of his widow. On the 30th of September, the son, Robert, went to the public market held upon that day at Haddington, and, along with James Amos, a relative, agreed to sell to the appellants, George Dunlop and Co., distillers at East Linton, sixty bolls of barley, of crop 1825, at the price of L.94, 10s., payable on delivery. The agreement was made with reference to a sample, the grain itself being at that time at Seggarsdean. It was alleged by the respondents, that all sales of grain in the Haddington market were made in bulk, and not by sample. Two days thereafter, the grain was carried by the son to the distillery of the appellants, where it was delivered, and the price paid to the widow. It was not alleged that in this matter the appellants acted otherwise than in optima fide, and the case was judged of upon that footing. The respondents, on the 28th of October, (being after the delivery of the grain,) applied for and obtained a sequestration of the stock and cropping remaining on the farm, in security, and for payment of the rent for the crop of that year. The proceeds proved insufficient; and, in December thereafter, they raised an action before the Sheriff of the county against the appellants and James Amos, concluding for payment of L.94, 10s., as the value of the grain. The Sheriff pronounced this interlocutor:—‘ Finds the general right of hypothec, existing in favour of the petitioners (respondents), not made special by sequestration, would not have operated as a legal bar to Robert Amos, tenant in the lands of

‘Saggarsdean, if then in life, from selling by sample the sixty Dec. 7, 1830;  
 ‘bolls of barley mentioned in process, by bona fide sale in public  
 ‘market, and that such sale, implemented by delivery, made by  
 ‘an apparent heir, or by persons entitled to the office of execu-  
 ‘tor, and in possession and management of the farm, is equally  
 ‘good to a purchaser in open market: Finds, that the sale in  
 ‘question was made by the son of the deceased tenant in the  
 ‘farm, and the price received by the widow of the tenant who  
 ‘was in possession and management of the farm, against whom  
 ‘recourse is open; and that the defender, James Amos, had no  
 ‘interest whatever in the transaction, having only assisted the  
 ‘son of the deceased with his advice, and handed the price from  
 ‘the buyer to the seller: Finds the objection of constructive  
 ‘fraud has, in this case, no effect against a bona fide purchaser  
 ‘in public market, as the very existence of fairs and markets  
 ‘depends on the security of purchasers, who cannot possibly  
 ‘know the condition of every person they may happen to deal  
 ‘with there, nor know the nature of the title held by the repre-  
 ‘sentatives of a deceased tenant, who are in possession of his  
 ‘farm: Finds, that the transaction on the part of the purchaser  
 ‘was fair and open, and that no collusion whatever existed;  
 ‘and, therefore, assoilzies the defenders from this action, but  
 ‘finds no expenses due to either party.’

The respondents then brought an advocacy, maintaining, 1st, That as the grain formed part of crop 1825, of which the rent had not been paid, and they had a hypothec over it for payment of the rent, they were entitled either to restitution of the grain, or to payment of its value. And, 2d, That although it was true that an agreement to sell the grain had been made in the public market, and their right might have been defeated if the contract had there been completed by delivery of the grain, yet as it was not so, and the transaction was concluded out of the public market, the appellants could not found any effectual plea in defence on the ground of the agreement made in the market.

To this it was answered, 1st, That although originally landlords had a right of property in the crop growing on their farms, yet this right had ceased, and tenants had, under the statute 1449, a real right in their farms, and consequently in the produce; that by the nature of the modern leases (by which rent was payable in money), landlords necessarily consented that tenants should have it in their power to convert the produce into money; and although it was competent, where the rent was not paid, for the landlord to retain the crop, or, before the price was paid

Dec. 7, 1830. by a purchaser, to get restitution or payment of the price, yet he could not insist, after the price had been bona fide paid to the tenant, that the purchaser should make a second payment; and, 2d, That sales in public market were protected against the effect of the landlord's hypothec; that there was no ground for the distinction between the sales by sample and in bulk; for although in the former case, the risk of the perishing of the grain lay upon the purchaser, yet so soon as delivery was made, and the price paid, he was effectually protected by the transaction having taken place in public market.

The Lord Ordinary pronounced this interlocutor: 'In respect that the barley in question was sold by sample, and was not brought to market and publicly exposed there in bulk, Finds, that the respondents (appellants), George Dunlop and Company, are not entitled, in this transaction, to the ordinary privileges of purchasers in open market; therefore advocates the cause; finds the said George Dunlop and Company liable to the advocates in the sum of L.94, 10s., with interest thereon, from 30th of September, 1825, as libelled: And in respect it is not alleged that the respondent, James Amos, had any interest in the sale, assoilzies him from the conclusions of the action; finds no expenses due to any of the parties, and decerns.'

The appellants then reclaimed, and the Court, after allowing reports as to the practice in Sheriff Courts, appointed the following query to be put to the other judges: 'On the supposition that Messrs Dunlop and Company in this case acted bona fide, and without any collusion with the widow and son of Amos the tenant, the Judges are requested to give their opinion, Whether the sale by sample, as set forth in the papers, is valid and effectual to Messrs Dunlop and Company, as against the landlord's right of hypothec?'

*Lords Justice-Clerk, Glenlee, Pitmilley, Cringletie, Meadowbank, Mackenzie, Medwyn, Corehouse, and Newton*, returned this opinion: 'By the law of Scotland, a landlord enjoys a right of hypothec in the fruits produced on his farm, in security of the rent of that year in which they are produced, and this whether he has used sequestration or not. It is the nature of the real right of hypothec to be effectual against every possessor of the subject hypothecated, and of course to give the landlord, while the rent remains unpaid, the power of recovering the crop from any person in whose hands he may find it. This seems anciently to have obtained in all cases whatever: but for a long period a restriction of the right has, from favour

‘ to commerce, been admitted, where the article has been sold Dec. 7, 1839.  
‘ in a public market. A sale in these circumstances, if the pur-  
‘ chase has been in bona fide, is effectual; and if he has paid  
‘ the price, he is not liable to any demand at the instance of the  
‘ landlord. We do not, however, conceive ourselves authorized  
‘ to hold that this restriction of the landlord’s right extends to a  
‘ sale by sample, such as that which has given rise to the present  
‘ question. Another essential circumstance in proper sales in  
‘ public market, and that which has chiefly weighed in the ad-  
‘ mission of this restriction of the landlord’s right, and of simi-  
‘ lar restrictions, which, through favour to commerce, have  
‘ obtained in other countries, is totally wanting here, and that  
‘ is, the publicity caused by the open exposure of the goods, as  
‘ on sale, to all frequenting the market. We can conceive,  
‘ and we believe there may be, markets for sale by sample  
‘ where such publicity may be secured; as where it should be  
‘ required that samples of all grains meant to be sold, should be  
‘ publicly exposed in a particular place, appropriated for the  
‘ purpose of general examination, and in such a way as to show  
‘ not only the quality but the quantity of each meant to be sold,  
‘ with the names of the sellers; it being always understood that  
‘ delivery is still required to complete the sale, and to exclude  
‘ the landlord’s right. But the market of Haddington is not of  
‘ this nature, but one where grain is sold in bulk; and a sale  
‘ by sample there has necessarily no more publicity than if made  
‘ any where else. It is a mere private transaction, which may  
‘ be unknown to all but the contracting parties, and which may  
‘ not disclose to another mortal the seller’s intention of dispo-  
‘ sing of his crop. We see no reason why a bargain in such  
‘ circumstances shall, merely because the buyer and seller trans-  
‘ act privately in a place where there is a public market at the  
‘ time, be entitled to any privilege, as against the landlord,  
‘ which is not equally competent in every other bona fide sale.  
‘ In England, and we believe in some other countries, where  
‘ sales in public market, or market overt, are so greatly favoured,  
‘ that stolen property may be thus effectually transferred, so as  
‘ to cut off the right of the true owner, it is essential, we under-  
‘ stand, to this effect, that the stolen articles be publicly exhi-  
‘ bited for sale; and in the case of horses it is necessary that  
‘ they be exposed for one whole hour together in the place used  
‘ for such sales. Were stolen goods to be sold by sample, pat-  
‘ tern, or description, without being brought to, or exhibited in,  
‘ the market at all, the sale would have no effect against the  
‘ owner. The reports in process by the Sheriff-clerks seem to



Dec. 7, 1830. ' us of little or no consequence. In so far as any similar question is known to have occurred, the decision appears to have been in favour of the landlord ; and the opinions of the reporters, as to what they conceive is, or should be the law, are plainly of no weight. We are aware that many advantages may attend the practice of selling by sample, and that an establishment of markets on this principle may be highly useful. But such considerations, however proper for the attention of the Legislature, can have no influence where the question is solely as to the existing law. We are of opinion, therefore, that holding Messrs Dunlop and Company to have acted with perfect bona fides, the sale by samples, as set forth in the papers, is not effectual to them as against the landlord's right of hypothec.'

In consequence of this opinion, the Court, on the 27th of February, 1828, adhered to the judgment of the Lord Ordinary.\*

Dunlop and Co. appealed.

*Appellants.*—1. If a party who has the property of a commodity in himself, has sold and delivered it, and received payment, the purchaser thenceforward acquires the absolute property, and unless mala fides be established, his right cannot be affected by any claim which third parties may have against the seller. Till delivery, the property no doubt remains in the seller, and it is competent for his creditors to attach it in payment of their debts; but after delivery the property is completely vested in the purchaser, and cannot be touched by the creditors of the seller.

Tenants are proprietors of the crop raised on their farms, subject to a claim of rent by the landlord. At an early period they were not proprietors. The ground was cultivated by serfs or boers, adscripti glebæ, and, consequently, the crop raised was not their property, but that of the landlord, and so could not be disposed of by them. In a more advanced period a sort of partnership existed between the tenant and the landlord, the latter contributing the ground and stocking, (called steelbow,) while the former gave his labour and skill. At this time that which was called rent, but which was truly the landlord's share of the produce, was delivered in kind. In modern times, matters have been entirely changed. Tenants have become so

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\* 6 Shaw and Dunlop, 626.

wealthy that they can supply the capital requisite for cultivation Dec. 7, 1830. ting their farms; and landlords, in order to obtain payment of money rents, have found it advantageous to alienate the use of their farms, and consequently the produce, for payment of a certain yearly rent, or, in some cases, for slump payments, called grassums. There is no longer any sort of partnership, and the tenant thus becomes the proprietor of the crop. The landlord's original right of property has therefore ceased, for two persons cannot at the same time have each the entire property of the same subject. His right is now of the nature of a lien or security for payment of his rent. This lien or hypothec may no doubt be converted into a real right by sequestration; but if it be not so, it is competent to the tenant, as proprietor of the crop, to sell it, and by delivery to confer on the purchaser an absolute right. No doubt the landlord is entitled to receive payment if the price has not been paid to the tenant, but where it has been paid he is not entitled to make a purchaser pay a second time, just as if the tenant had had no sort of right to dispose of the crop.

2. But independent of the preceding plea, a sale made in public market is effectual to exclude the landlord's right. It is admitted that if the sale be in bulk it is so. But it is said that if it be by sample it is not so. There is no authority for such a distinction, and both commercial expediency and the interest of landlords are against it. In regard to a sale in bulk, it is plain that if the tenant can succeed in transporting the grain to the market, and there sell it, the landlord's right is at an end. But where the sale is by sample, the grain remains on the farm, and may be attached by the landlord at any time before delivery, and the publicity of transporting it to the place of delivery is as great as the act of carrying it to the public market. Therefore, in the case of sale by sample, the landlord has the grain within his power for a much longer time than if sold in bulk, so that sales by sample are not so dangerous to his interests as sales in bulk.

*Respondents.*—1. The question is not one of expediency, but one of legal right. Both the decisions and the institutional writers coincide in laying it down as settled law, that the crop of each year is pledged to the landlord for the rent of that year; and that although the tenant may have sold the crop, or although it has been carried off by his creditors in satisfaction of their debts, the landlord is entitled to restitution,

Dec. 7, 1830. or to payment of the value. It is no answer on the part of a purchaser to say that he has paid the price to the tenant. It was his business to have ascertained that the rent had been settled.

2. By the law of Scotland, in order to constitute an effectual sale and transfer of the property, there must not only be an agreement to sell, but actual tradition, "*traditionibus, dominia rerum, non nudis pactis, transferuntur.*" Where property is transferred in public market a purchaser is safe. But in order to this there must be a complete transfer. In the present case there was no such thing—there was merely an agreement or contract between the parties, which might have been broken off or defeated before the property was transferred; but it is admitted that the tradition so far from being made in public market took place privately. The appellants, therefore, cannot plead the benefit of public market. The rule is quite settled in England, that to enjoy that privilege the goods themselves must have been exposed in the public market.

LORD CHANCELLOR.—The case which your Lordships have just heard argued by the learned Counsel involves a question of Scotch law, and comes within the description to which I referred in my judgment this morning. It turns upon the principles of a law, in many respects very different from our own; and it is contended, on the part of those who are here to support the judgment, and justly held by the learned Judges themselves, that questions of this nature demand much attention before a satisfactory decision can be given. I have therefore listened with very great attention and anxiety to the arguments on the part of the appellants and the respondents, and to the reasons which have been given by the learned Judges upon this subject, and I must confess that the doubts (and I may say the difficulties) with which I was embarrassed from the beginning, have not as yet been removed. As the decision of your Lordships will go to establish one way or other, in the kingdom of Scotland, whether or not the law, with respect to this most important subject, is similar, and in unison with that of England (for at present it is widely different); a question will arise out of your Lordships' judicial determination, whether or not the very serious inconveniences shall continue to exist, in regard to the transactions of mercantile men with respect to the most important articles of life, or shall be removed by your Lordships acting in your legislative capacity? I therefore certainly do not feel that I ought at present to call upon your Lordships to come to any definitive judgment. I propose, therefore, to defer, for a few days, the further consideration of this question. During that interval, I shall deem it my duty (in order the more effectually to assist your Lordships in coming to a right decision), to read again carefully the whole of these voluminous

papers, and to examine more minutely the points which have been stated Dec. 7, 1830. at the bar. With all the deference, and unfeigned respect, which is certainly due to the opinion of the learned Judges below on such a question, I shall—if I feel that those doubts, and I may say difficulties, have not been removed, there being no authority in any thing like recent or modern times, and after the law has assumed its present shape; for it is admitted by the respondents, that the law has undergone some change—I shall feel myself obliged, however reluctantly, to submit to your Lordships' approbation, the propriety of reversing this judgment.

LORD CHANCELLOR.—My Lords, in this case, one of great importance to the general principles of the law of Scotland, which differ materially from the law of this country in the respects I am about to point out, I would move your Lordships to resume the further consideration, with a view to proceeding to judgment. My Lords, when this case was argued, which it was with distinguished ability and learning on both sides of the bar, it appeared to me to involve questions of apparently so alarming a description to the commercial interests of that part of the united kingdom, of a nature indeed so inconsistent with all principles, and so utterly repugnant to the most established doctrines of English commercial law, as well as the law of landlord and tenant, that I deemed it necessary, before I proposed to your Lordships either to affirm or to reverse the decision of the Court below, to take a short time thoroughly to examine the cases cited, and the authorities quoted on the one side and the other, in order that I might be able to advise your Lordships, upon more mature deliberation, and with greater security to the administration of justice. I have now gone through that enquiry, in addition to the attention which I bestowed on the argument at the bar, and the result has been, to remove all doubt which I then entertained upon what was truly the law of Scotland. My Lords, the facts of the case are extremely short. I will state them to your Lordships, and you will at once perceive, not only the nature, but the difficulty, and the great importance of the principle in question:—My Lord Dalhousie brings his action against a corn merchant in East Lothian, the county in which his estate is situated, for what is called repetition, which, your Lordships know, means payment back to him of a certain sum of money, being the value of sixty sacks of corn, purchased by that corn merchant in the public market-place of the town of Haddington, of a tenant of my Lord Dalhousie. I am exceedingly rejoiced at the presence of the noble and learned Lord (the Earl of Eldon), on this occasion; because, though he had not the opportunity of hearing the argument, he will, I am sure, agree with me in feeling the complete novelty to English lawyers, of the principle held in the Courts of Scotland, to which I am about to advert. Lord Dalhousie brings this action, not against his tenant, but against the purchaser from the tenant, in what we call market overt, public market, perhaps the greatest corn market in Scotland, that of Haddington, the capital of East Lothian. The tenant's rent was in arrear for that year, of which the corn sold was part of the crop. It is not pretended, indeed it is distinctly denied, and

Dec. 7, 1830. is negated by the whole findings in the case, that the corn merchant had any knowledge whatever of the arrear of the seller's rent. It is admitted that he paid the full price for the corn; it is admitted that he was perfectly in bona fide through the whole course of the transaction; that there was no fraud, no collusion whatever between the tenant and the purchaser, with respect to the rights of the landlord, nor any intention, on the part of the purchaser, to defeat the landlord's claim. Now, the decision of the Court of Session, is neither more nor less than this, that the landlord has a right to call upon the purchaser, and say,—'Notwithstanding you were a bona fide purchaser, without notice, in open market, but a purchaser by sample and not in bulk, you must pay to me the whole price which you have already paid to the seller, that being due to me, the landlord, in respect of my tenant's rent which was in arrear for that year, of the produce of which the corn sold formed a part.' The first thing which strikes every one is, that if this judgment be consistent with law, it becomes extremely difficult, if not quite impossible, for any person safely to deal in corn; because, when he goes even into the public market, he must ask the question of every man who sells to him, if he is a tenant—'Is your rent in arrear? How stands your account with your landlord?' And, even if he is told that the rent is not in arrear, he still must act at his own risk; because, if the tenant should be found to have deceived him, though, true it is, he might have an action against him for the deceit, yet the falsehood of that representation would not defeat the landlord's right—the purchaser must equally pay the price of the corn over again; and therefore he must take another precaution—he must go and tell the landlord: 'I have been asked in Haddington market to purchase corn of your tenant, but not being sure how your account stands, I have come to you, twenty miles off, to know whether or not his rent is in arrear.' Nothing short of that can make a man safe, according to this decision. My Lords, if this were a question of English law, instead of Scotch law, so far it should seem, that nothing could be more simple or more easy than the decision of the case, and nothing more erroneous, not to say more startling, than the decision of the Court below; but then there come one or two admissions, and one or two statements, not contradicted on the other side, which plainly show that the Scotch law proceeds upon principles diametrically opposite to those of the English law. In the first place, if a tenant sells in bulk, in the most honest and regular way possible, to a corn-factor, or other purchaser, but not in the market, without any knowledge on the part of that purchaser of the state of the tenant's account with his landlord, or any fraud on the part of the purchaser, or any collusion, it is admitted on all hands—and no one conversant with the law of Scotland affects to doubt it—that the landlord may recover the goods by an action, in the nature of an action of trover, or the price of them, as being paid in the buyer's own wrong. In the next place, it is admitted, that if the sale is in the public market, and the purchaser acts bona fide, and without notice of the debt to the landlord, provided he has not paid the price, although the contract is

completely executed between them, the purchaser is bound to pay the price to the landlord. These being matters agreed to on both sides, it is quite evident to my mind, that the Scotch law proceeds on principles perfectly opposite to those of the law of England; and the more I have enquired, the more I have been satisfied of this. It appears that, in the times when the law was originally established, the landlords being the law-makers, the hypothec of the landlord over the tenant's stock is of a nature exceedingly different from, and much more extensive, than the security of the same kind which your Lordships have for your rents in this country. You can distrain the goods for rent, while they remain upon the farm, or a remedy is given under particular statutes, in case they are taken away in fraud of that right, to follow them within certain limits, and to deal with them according to those statutory provisions: but if the goods are sold to a bona fide purchaser, and he is not in collusion with the tenant, it is clear that you have no such right as the Scotch landlord has. The Scotch landlord has a right of hypothec in the most strict sense. He can follow the crop wherever it goes, unless in the one excepted case, where it is sold in bulk in market overt. The only question in this case, seemed to be this—those I have stated being the admitted principles of the Scotch law—Is a sale by sample equivalent to a sale by bulk in market overt? Now, referring to the principles of the English law, I consider that the landlord's right of hypothec in Scotland, is to be compared to the right the owner has in England, of recovering goods, the property of which has been sought to be changed by stealing those goods, though it cannot so be changed, but in which there is one exception analogous to the exception to the landlord's right of hypothec in Scotland, namely, the goods being sold in market overt. Your Lordships will, I apprehend, require no argument to show, that the law, with respect to market overt in England, applies only to sale by bulk, and does not at all apply to sale by sample. Your Lordships are aware, that it has been decided, that the whole sale must be completed in market overt. There is a celebrated case in Lord Coke's Reports, intitled, 'The Case of Market Overt,' in which it is held, that the goods must be sold in a shop accustomed to sell those goods, so that the possessor cannot change the property by selling silversmith's goods in a scrivener's shop, which was the question raised there, but the whole must be sold in the open market, not behind a screen or cupboard, but so that passengers passing by could see it;—they must be so sold, that the transaction of the sale must be visible to passers by; that is the foundation of the principle. Your Lordships see, therefore, that the English law principle with respect to sales in market overt, is the Scotch law principle, applying it in the one case to the non-change of property feloniously stolen, and in the other case, to the landlord's right of hypothec, which is peculiar to Scotland, and unknown to this country. My Lords, I have had a good deal of communication with very learned persons in Scotland, as to the practice among tenants, corn-factors, and merchants, and I find there was a great difference of opinion in the trade as to the rights of the respective parties, until this case of Lord Dalhousie. The largest corn-factors

Dec. 7, 1830. in Scotland, whose transactions amount, probably, to as much as all the rest put together, say, that they never dreamt of such a risk being run, and that, having transacted business to the amount of hundreds of thousands of pounds, they never yet thought of asking the question—Whether the tenant was in arrear? But the decision in this case has created a great anxiety that the law should be settled one way or the other by your Lordships. My Lords, on the best consideration I have been able to give to this subject, on the ground on which the Scotch Judges put it, (admitting there is no decided case—admitting that the only cases resorted to as authority for their decision do not bear it out; because, in each of those cases, there was a great doubt upon the fact, whether the whole sale was in open market, and whether there was not collusion with the tenant,) on the principle of the law, upon the application of the principle of market overt,—which clearly is the doctrine to be applied in this case, as soon as we find the landlord has, what he has not with us, the right of hypothec,—it certainly appears to me, that the grounds of judgment, though at first they appeared to be incumbered with great difficulty, from their being so irreconcilable to our own notions, are well founded. If the case had been what we call doubtful, and, if it had been a measuring cast between the two grounds of decision, one should have leant very strongly against a doctrine so greatly tending to fetter commerce as one setting aside a sale by sample in a public market; but, however inexpedient such a law may be, and however much that inexpediency is to be complained of by his Majesty's subjects in Scotland, not only by the dealers in corn, but by all the consumers of corn,—however it may call upon your Lordships to apply, in your legislative capacity, a remedy for this, yet, in your judicial capacity, you have no course left but to affirm the almost unanimous decision of the Court below;—all the Judges were consulted—some of the ablest Scotch lawyers have appended their names to this opinion; and there is but one dissentient voice among the whole. It is not for Judges to decide, whether the law shall be put in force or not. Judges have but to administer the law. The Judges in Scotland have administered the law as they found it. Your Lordships are mere Judges by appeal, on their judgment, and therefore are acting as Scotch law Judges; and, in that capacity, I humbly submit, your only course is to affirm the decision. In the circumstances of the case, my Lords, I should not propose to your Lordships to give any costs.

The House of Lords accordingly ordered and adjudged that the interlocutors complained of be affirmed.

*Respondent's Authorities.*—Ross on Venders, &c. p. 188, 2d ed. 6 East, 437, 441. 4 Taunton, 531. 4 Barn. and Ald, 564.

A. MUNDELL—SPOTTISWOODE and ROBERTSON—Solicitors.

DAVID CARNEGIE, Esq. Appellant.—*Wetherell—Wilson.*

No. 49.

MISS MARGARET SCOTT, Respondent.—*T. H. Miller*  
—*Robertson.*

*Bona Fides.—Landlord and Tenant.*—Held (affirming the judgment of the Court of Session) that an heir who continued in possession of a farm after the death of the tenant, on a supposed right vested in the heir by the terms of the lease, was not liable in violent profits prior to the judgment of the House of Lords, (reversing that of the Court of Session,) finding that the heir had no right.

THE late Thomas Carnegie of Craigo, the father of the appel- Dec. 9, 1830.  
lant, offered, in October 1769, to let by public roup the separate 2<sup>D</sup> DIVISION.  
farms of Upper and Nether Dysart, stipulating that the highest Lord Pitmilly.  
offerers ‘shall be obliged, within the space of three months after  
‘the roup, to enter into and subscribe formal tacks, written  
‘upon stamped paper, whereby the said Thomas Carnegie, on  
‘the one part, shall set, and in tack and assedation let, to the  
‘highest offerers respectively, and their heirs, the foresaid farms  
‘purchased by them at the said roup, for the space of two nine-  
‘teen or thirty-eight years and crops; and after the expiration  
‘of the said two nineteen years, for all the years and crops of  
‘the lifetime of the person having right to the principal tack,  
‘either as heir or as assignee appointed within the space after  
‘expressed, at the expiry of the said two nineteen years from  
‘and after their entry to the said lands, which is hereby declared  
‘to be and begin to the houses, yards, and grass, at the term of  
‘Whitsunday 1770, and to the arable land at the separation of  
‘the-crop 1770 from the ground; by which tack the said Tho-  
‘mas Carnegie shall give power to the tacksmen, or their heirs  
‘respectively, of assigning their said respective principal tacks  
‘at any time before the expiration of the first twenty-nine years  
‘of the said tacks; but if such assignations are not made, and  
‘the assignations duly intimated to the said Thomas Carnegie,  
‘his heirs and successors, before that time, then the said tacks  
‘are to fall to the heirs of the person having right to the said  
‘principal tacks, at the end of the said twenty-nine years, and  
‘all assignations made of the said tacks after the lapse of the  
‘said twenty-nine years, and although thus made, if they are  
‘not duly intimated to the said Thomas Carnegie or his fore-  
‘sails, before the end of the said twenty-nine years, are hereby,  
‘and shall, by the said tacks, be declared to be void and null.’  
The late Patrick Scott, father of the respondent, was the high-



Dec. 9, 1830. est offerer for the farm of Nether Dysart, and a lease of that farm was accordingly granted on the 27th of October, in terms of the articles of roup, to him, 'his heirs and assignees, (such assignees 'being always made in manner and within the space after 'expressed,)' 'and that for the space of two nineteen or thirty- 'eight years and crops, and after the expiration of the said two 'nineteen years, for all the years and crops of the lifetime of 'the person having right to this present tack, at the expiry of 'the said two nineteen years, either as heir or as assignee, 'appointed within the space after expressed.' The deed then contained the following clause:—'And further, the said Thomas Carnegy hereby gives and grants full power to the said 'Patrick Scott and his foresaid to assign this present tack, at 'any time before the expiration of the first twenty-nine years 'thereof; but if such assignees are not made, and the assigna- 'tion duly intimated to the said Thomas Carnegy, or his heirs 'and successors, before that time, then this tack is to fall to the 'heirs of the person having right to the same at the end of the 'said twenty-nine years; and all assignments made of this 'present tack after the lapse of the said twenty-nine years, and 'although then made, if they are not duly intimated to the said 'Thomas Carnegy or his foresaids before that period, are here- 'by declared to be void and null.'

In virtue of this lease Mr Scott entered into possession, and resided upon the lands with his family. It was stated on the part of the respondent, that when the time arrived for determining whether he should grant an assignation, so as to put the alternative liferent upon the life of an assignee, he was seventy years of age, and consulted counsel, as to whether, under the terms of the lease, the liferent would devolve upon his heir, and that being advised that it would, he did not execute any assignation in favour of the respondent, who (she alleged) was his heir, which otherwise he would have done.

Mr Scott survived the fixed period of thirty-eight years, and did not die till 1814, being about six years after the expiration of that period, and leaving two daughters. The appellant, (who had succeeded to his father,) presented on the 14th of April of that year a petition to the Sheriff of Forfarshire against the respondent and her sister, and also against sub-tenants, praying 'to find that the foresaid tack or lease terminated and 'expired at the death of the said Patrick Scott, and therefore 'to decern and ordain the said several persons immediately to 'remove from the lands of Dysart, and whole pertinents 'thereof, to the effect the petitioner, as having right in manner

‘foresaid, or others in his name, may enter thereto; and, if Dec. 9, 1830. necessary, to grant precepts of ejection; and in case the respondent shall object to remove, and thereby occasion expenses, to find her liable in damages, and in the expenses of this application, and procedure to follow hereon.’ The respondent opposed this petition, on the ground that she was entitled to the enjoyment of the possession during her lifetime; but the Sheriff-Depute, on the 21st of June, pronounced this interlocutor:—‘In respect the late Patrick Scott did not assign the lease of the farm in question in terms of the tack, finds that the right of the said Patrick Scott to continue tenant after the first twenty-nine years of the lease, is not to be held forfeited or taken away by inference from ambiguous clauses in the lease, without an express declaration to that effect; finds that Patrick Scott remained tenant after the first twenty-nine years of the lease, and was, at the expiry of the second nineteen years specified in the lease, the only person having right to the tack; finds, therefore, that the tack terminated at his death; finds that the defender (respondent) will be entitled to reap the crop of any fields that were sown at the time of Mr Scott’s death, on paying a proportion of the whole rents effeiring thereto; finds that the pursuer must pay a bona fide price for the labouring or sowing of any ground which has been laboured or sown since Mr Scott’s death; and, with these explanations, decerns in the removing, and ordains all the defenders to remove within twelve days from this date; but finds no expenses due.’ He also issued the subjoined note of his opinion.\* The respondent then presented a bill of advocacy, but it was refused by Lord Glenlee. Against this judgment she reclaimed to the Second Division, who altered, and remitted with instructions to pass the bill. On this occasion the question of right was fully discussed, and the late Lord Meadowbank, who was in favour of the respondent, delivered the subjoined opinion.†

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\* ‘I am decidedly of opinion, that if, at the expiry of the first twenty-nine years of the lease, any competition had occurred between the late Mr Scott and the defenders, Mr Scott would have been found the only person having right to the tack. The lease was granted to him, and his right is not to be taken away by any inference from doubtful clauses framed on the supposition that Mr Scott was likely to die before the expiry of the first twenty-nine years of the lease; and which clauses were therefore worded so as (in case of any assignation being granted by Mr Scott, or of his death) to secure the right of the heir or assignee.’

† ‘I am not entitled to conjecture a construction, when I have words that carry a clear grammatical construction and a logical one. Now, what is this case?

Dec. 9, 1830. The case having then come before Lord Pitmilley in the Outer House, he pronounced, on the 11th July 1815, this interlocutor:—‘The Lord Ordinary having heard parties’ procurators, and thereafter considered the process, finds that the clause in the lease, on which the advocator’s (respondent’s) claim is founded, is not applicable to the case which happened, of the original tenant not having assigned the lease within the stipulated term of twenty-nine years from its commencement; but having survived the period of thirty-eight years from the date of the lease, and having himself remained in possession of the farm during his lifetime, finds that the clause of the lease referred to by the advocator provides for the continuance of the lease, after the fixed period of thirty-eight years, during the lifetime either of an assignee who might have acquired right to the lease before the expiration of the first twenty-nine years, and, in virtue of his assignation, might have been in possession at the end of the thirty-eight years, or during the lifetime of the person who may have been the heir of the tenant at the end of the twenty-nine years, and afterwards might have succeeded to the lease, and been himself in possession at the expiration of the thirty-eight years; finds that the right of liferent adjoined to the fixed period of thirty-eight years, was intended to be given to the person in possession when the liferent was to commence, and was accordingly, in one of the cases mentioned in the tack, conferred on an assignee to the lease; and finds that there is no room for holding, either that the heir of the original tenant could dispossess the tenant in possession, or that the duration of the right of the tenant in possession, after the fixed period, was to depend on the length of the life of the person who may have been presumptively his heir at the end of twenty-nine years from the commencement of the lease; repels the reasons of advocacy, and remits the cause simpliciter to the Sheriff.’ To this judgment, on considering two representations with answers, he adhered on the 16th January and 23d

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‘The tack is to P. Scott, his heirs and assignees. These are the grantees—the period of endurance is a different matter—it might refer to any man, or to the king. I say, there is here a nominee of the liferent—it is either the assignee duly constituted, or the heir who becomes indefeasible. Look at the words: for the space of two nineteen years, and for all years and crops of the lifetime either of heir or assignee; that is, a nominee of the liferent. If Mr Scott had survived the heir, the liferent of the nominee would be gone, and he must have removed at the end of the thirty-eight years. Are we to take a probable, but conjectural meaning, against a meaning not so probable, but which is strictly deducible from the words employed, and capable, in all respects, of being logically applied, to regulate the rights of parties in the circumstances of the transaction?’

May, 1816: The respondent then presented a petition to the Inner House; and, on advising it, their Lordships were at first equally divided in opinion, but thereafter altered the interlocutor, advocated the cause, assoilzied the respondent, and found her entitled to expenses. Against this judgment the appellant reclaimed; but on advising his petition with answers, the Court, on the 26th of May 1818, adhered.\* The appellant then carried the case to the House of Lords, and on the 6th of March, 1822, their Lordships ordered and adjudged that the 'interlocutors complained of in the said appeal be, and the same are hereby reversed: and it is farther ordered and adjudged that the interlocutors of the Lord Ordinary of the 11th of July, 1815, and the 16th of January and 23d of May, 1816, be, and the same are, hereby affirmed.†

In the meanwhile, the respondent continued in possession, subset the greater part of the lands in 1818 at a large surplus rent, and built a mansion-house.

The case having returned to the Court of Session, their lordships 'adhered to the interlocutors of the Lord Ordinary mentioned in said judgment,' and remitted to his Lordship to proceed farther in the cause. The appellant having claimed violent profits from the date of the commencement of the action in the Sheriff Court, Lord Pitmilley found him entitled to them, and ordained him to give in a condescendence of the amount; but on a representation by the respondent, his Lordship recalled this interlocutor, ordered a condescendence by the appellant of the facts on which he rested his demand, and afterwards reported the question on informations to the Court. On advising them, their Lordships, on the 4th of December 1827, found, 'that the pursuer (appellant) is not entitled to violent profits from any earlier date than the 6th of March, 1822, when the judgment of the House of Lords was pronounced, but found 'no expenses due.‡

Mr Carnegie appealed.

*Appellant.*—1. The ground on which the plea of bona fides by the respondent rests, is excluded by the special terms of the judgment of this House. By that judgment, the interlocutors

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\* It was stated by the respondents that Lord Robertson, who had formerly given an opinion adverse to the judgment, now concurred in it.

† See 1 Shaw's App. Ca. p. 114.

‡ See 6 Shaw and Dunlop, 206.

Dec. 9, 1830. of the Lord Ordinary are affirmed; and to these interlocutors the Court, in compliance with that judgment, adhered, so that the case must now be judged of as if the interlocutors of the Inner House had never been pronounced. But as the plea of the respondent is founded on the existence of these interlocutors, and as they must be considered as expunged from the record, the very basis of her plea is removed.

2. Independent of this, the judgment of the Court of Session is erroneous, and was pronounced in consequence of not advert-  
ing to a material distinction between this case and the others which have been decided in regard to bona fides. In the former cases, (such as those relative to the Queensberry leases and the sales of the Shenchuan estate,) the parties had titles which, ex facie, were unexceptionable, and were set aside only in respect of extrinsic objections. These rights formed, therefore, good titles of possession, till a judgment of a court of law was pronounced, finding them bad. But, in the present case, the respondent had no title at all. She no doubt contrived, by force of ingenuity, to rear up a construction which induced a majority of the Court to pronounce a judgment in her favour. But both the Sheriff Depute, the Lord Ordinary, the minority of the Court, and this House, were clearly of opinion that the respondent had no title at all. If the appellant had challenged it on the ground of defect of power in his father, or on some similar extrinsic objection, the authorities relied on might have applied. But his plea was, that she had no title, and that plea was sustained by this House. Neither can the judgment complained of be reconciled with the principle on which the plea of bona fides rests. That principle is not merely that the party has consumed fruits which he bona fide believed to belong to himself, but that the true proprietor has culpably neglected to vindicate his right, and so put the party on his guard. Now the appellant does not claim the rents earlier than the date of his petition to the Sheriff, which was an intimation to the respondent sufficient to certify her that the appellant meant to enforce his claim. Nor does he claim more than the actual surplus rents drawn by the respondent during her illegal possession. Besides, she was not the true heir. If she had any title at all, it was only as heir portioner; and as the other heir portioner did not oppose decree of removing, the respondent is not entitled to plead bona fide possession as heir, nor to withhold payment of the full rents drawn by her.

LORD CHANCELLOR. (To the appellant's counsel.) On one point you need not give yourself any trouble. By making the word heir a word of

purchase, for that was really what was done here, an entire vested right was Dec. 9, 1830. given to this lady, whereas, after all, she was only one of the coparceners. She did not answer that description; but even if she had, there was so plain an absurdity in the case, that this House, in reversing, set up the Lord Ordinary's judgment in a very peculiar way—very fit matter for your argument; but this is a question of violent profits. Upon that subject, the law of Scotland totally differs from the law of England, where a person has been in bona fide perception of the profits;—in respect of the expenditure of money, and so on. The law of Scotland, in conformity with the civil law, under some modifications, and in conformity with the law in the greatest part of Europe, holds, that the bona fide perception and consumption of the fruits which are supposed to be consumed, follows the rule of bona fide possession—'bona fide possessor facit fructus perceptos et consumptos suos,'—that is, we know, a rule contrary to the English law. They also hold the giving relief to the extent of a portion, if not the whole, as far as it can be reasonably estimated, of that which he has bona fide expended for the improvement of the property. Now, that being the law, and the question being bona fides or not, it becomes a question of fact, how far this is bona fides entitling the party. What shall be considered the first ceasing of the bona fides, and where begins the mala fides, so as to render him responsible for the violent profits? Can you show me an instance where, there having been a possession during the subsisting judgment, which judgment was afterwards reversed on the clearest reasons of law in this House, the reversal of that judgment has been held to go by relation back during the period of possession of perception and consumption of profits; or where the party has been deprived of the benefit of his improvements, so as to impute mala fides to the possession while that judgment stood? You will argue the case exactly as you see fit; but, in the course of your argument, I wish you would apply yourself to that point. It will be very convenient with reference to the judgment I may feel it my duty to propose.

Before you close your argument, can you show me any instance of a decided case, where it was held to be a mala fide possession after the reversal of the judgment?

*Wilson, for Appellant.*—No, my Lord, I cannot.

LORD CHANCELLOR.—My Lords, I shall not require the learned counsel for the respondent to discharge their duty to their client, but I will shortly state to your Lordships the reasons for my judgment. Generally speaking, when I advise your Lordships to affirm a decision on appeal, I do not trouble your Lordships with the reasons which may be given; but there is a peculiarity in this case which leads me to state why I do not call on the learned counsel for the respondent to address your Lordships. It is not from mere deference to the authority of the Court below, though that is always entitled to the greatest respect; nor is it from any wish hastily to dispose of this matter, that I stop the counsel, and propose that you should decide the point at the present stage. But my reason is this,—we are here on a question of Scotch law, as to which

Dec. 9, 1830. there is nothing to assist us in our system of jurisprudence at all. Your Lordships are aware, that after a recovery in ejectment—it is not so in real actions—but after a recovery in ejectment, under the common law, there was an action given for recovering *mesne profits*, and that action was only limited, in the extent to which it went back, by the statute of limitations; consequently, it is every day's practice by our law, that as soon as a person recovers the possession—that is to say, as soon as he showed that he, and not the person before in possession, was entitled to hold that property, he recovers all the rents and profits from the tenant, as far back as the statute of limitations allowed him to go in quest of his right. No question was ever allowed to be raised as to the footing on which that possession had been holden. No doubt was ever allowed to be expressed by the Court as to the clear right of the landlord who had been kept out of possession all the while, whether by the tenant holding over on a lease which was determined, or by a person holding over on a lease which was bad; or by a person holding land to which he had no title, from being, in point of fact, not the real heir—whether the flaw in his title, and whereupon he had assumed to hold the land during these six years, had arisen from matter of fact, or from matter of law, it signifies not which—and whether or not he had been holding in circumstances which ought to have taught him to know he was not holding upon a right title; or, whether or not he had been holding in circumstances which rendered it doubtful if he had a right title. Nay, if the decisions of all the Judges of all the Courts, and the opinions of all the conveyancers, and the opinions of all the text writers,—if all that weight of authority had been departed from, and the former cases overruled by an ultimate decision,—if that ultimate decision was such as to entitle the lessor of the plaintiff to recover, (and I cannot put a stronger case of a *bona fide* possession,) during all those six years the possessor would be held liable to pay back to the lessor of the plaintiff, who now had his writ of possession under his judgment in ejectment, all the *mesne profits*; that is to say, the profits which he had been in the perception of during those six years. This is the law of England, and it is so far peculiar. The law of Scotland sanctions the doctrine, that the tenant, or the person in possession, who has held for a course of years, in circumstances which entitled him to say he had ground to suppose he was the rightful possessor, *facit fructus perceptos et consumptos suos*; and they also give him compensation for monies he may have laid out in the *bona fide* improvement of the property, which is also contrary to our law. Now, my Lords, this being the case, we come to a question of purely Scotch law, upon which, in guiding your Lordships to a safe conclusion, you have no assistance whatever from the known principles and the undoubted decisions of your own Courts; because they proceed not only upon a different, but upon a perfectly opposite principle. Now, when I find that there is in favour of the appellant's argument, no case whatever decided in the Scotch Courts—that there is not any *obiter dictum* of Judges where this might not have been the principal point in the case supporting the appeal, but that it rests entirely upon the reasoning and argument, (somewhat partaking of refinement)

of the very learned person,\* who took an opposite view to that of the Judges in the Court below, I feel myself incapable of advising your Lordships to reverse the decision which has been pronounced. I have considered, however, the principles upon which this decision rests, and they are in conformity to the principles of all the formerly decided cases. The question is shortly this : A person received a lease for two 19 years, from Mr Carnegy, and the life of the heir or assignee of the lessee ; the question arose, whether, those two 19 years being expired, the tenant's daughter, who was not his heir, (for that was justly contended by Sir Charles Wetherell in his able argument,) but who was one of his coparceners, and therefore did not strictly answer that description, could hold over. Suppose she had been an only daughter, in which case she clearly would have been the heir, it is quite clear the tenant might have assigned the lease, and then, besides the two 19 years, she would have taken for her life. But there being no assignment in this case, the question is,—Whether the daughter can say, I am the heir—I have a right to come in as a purchaser—I am so designated and described, that I take nominatim, as it were, as a purchaser, and come in for my life ; not only had my father right to hold over, but I have, because I am his heir. In the Court below, the Sheriff, in the first place, decided against the tenant. The Lord Ordinary decided in favour of the Sheriff's interlocutor, and it was taken to the Court of Session ; and they decided against the Sheriff, reversing his interlocutor, and reversing the interlocutor of the Lord Ordinary. Now, this was in 1817, and there was an appeal by the losing party ; and the judgment appealed was reversed by your Lordships' House, in a very remarkable judgment, conceived in extraordinary terms, and with a brevity and a conciseness and peremptoriness, which, being unusual in that most learned person† who moved the judgment, certainly shows what his opinion was, and that he thought it was one of the most extraordinary cases that ever came before the Court. The lawyers so held—your Lordships so held—the Court of Session now will probably so hold, and in future cases regulate their decisions by so holding. But the question is, whether Miss Scott was bound to anticipate this, and to discover that the Court of Session was wrong, and that your Lordships would set them right ? Can I say that a five years' possession from 1817 to 1822, during all which time she was in possession of a judgment in her favour, showing not only that she was in bona fide, but that she was right in point of law, and entitled to go on, does not protect her ? Could I advise your Lordships that there was a call upon her, to say, ' they have decided in my favour, but I know they were wrong in their views of the Scotch law, and could not construe the instrument according to its principles, and therefore I will abandon the judgment in my favour, and pack up my goods and remove from the farm ? ' They say she was in mala fide during all the time ; but they must be prepared to shew that. But then (and that is the most judicious mode of putting the

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\* Lord Alloway.

† Lord Eldon. See 1 Shaw, Ap. Ca. 114.



Dec. 9, 1830. question for their purpose) it is argued by Sir Charles Wetherell, and Mr Wilson, that this is not the common case of a deed sought to be reduced—they say there is this distinction, that if there was an entail, and the question was, whether a lease was granted under fetters of entail, in contravention of those fetters, which was the case of Elliott and Pott; or if there was a lease sought to be reduced on the ground of force, or fraud, or concussion, so as to show that it ought not to stand, but ought to be set aside—in that case, they say, the question will arise of bona fide possession; and while they admit that they have no instance of a person being held accountable for violent profits, there standing a judgment in his favour, although afterwards reversed—though they admit there are no such instances, they put it to the other side, and say, ‘Do you produce a case in all respects like the present, where the parties have been held to be in bona fide possession, with or without a judgment—where there is no reduction of any deed, but a case where the question arises on the construction (as I understand them) imposed upon the deed, and not the destruction of the deed by a reduction.’ My Lords, I cannot myself see that there is any solid ground for this distinction, because the title of the party is the lease. The lease may be bad on various grounds. It is bad, if it is granted in the non-execution of power. It is bad, if it is granted in contravention of the fetters of a good entail. It is bad, if it is granted by a person non habens potestatem to grant. It is bad, if it is extorted by force, or obtained through fraud; or if it is granted by a married woman, without the consent of her husband, or by an infant, without the consent of the guardian; in which case it is reducible, as against the infant. Now, my Lords, there are all these various heads of reduction. But there is also another head on which the lease is not valid to convey the interest sought to be established by it, and that is—that the construction of the lease itself, in point of law, does not give the right contended for to the lessee; but I do not see, upon principle, any distinction whatever between those various sources of invalidity in the title of the lessee. All that is different in this case is, the ground upon which the title shall be held invalid. The invalidity of the title of the lessee is the only question. He has no valid title, whether that flaw in his title arises from the entail being contravened, under which the lessor made the lease, or from force or fraud, impressed or imposed upon him when he granted the lease, or whether it is held from the words of the lease never having conveyed an estate to the lessee for years; in all those cases, the invalidity of the lease is the material point; and that being once established, the only question that remains is, whether he was in bona fide or mala fide during the period of the possession. Such being the grounds on which I have put this question, and having repeatedly asked for a case in which there has ever been a decision, or even an obiter dictum of the judges the other way, can I move your Lordships to shake the judgment complained of? Observe also, that Lord Pitmilley first of all pronounced an interlocutor as Lord Ordinary, by which he found violent profits due; yet with all that leaning in favour of the original decision in the former appeal, and holding it to be a clear case, as he had a right to

do at all times, and still more after the decision affirming his interlocutor, Dec. 9, 1830. yet he afterwards, as a Scotch lawyer, when he came to reconsider the question of violent profits, and discussed the question with his brothers, gave it in favour of the lessee. I therefore cannot, on these grounds, recommend to your Lordships to do that, which would be, for the first time, introducing into the law of Scotland a principle not only never before acknowledged in that system of jurisprudence, but which is negatived by repeated decisions—between the principles of which decisions and the present I can discover no distinction. In this case your Lordships would certainly not be disposed to give any costs.

The House of Lords accordingly ordered and adjudged that the interlocutors complained of be affirmed.

*Appellant's Authorities.*—2 Stair, 1. 23. 2 Ersk. 1. 25.

*Respondent's Authorities.*—1 Stair, 7. 12. 1 Bankton, 8. 18. 4 Ersk. 2. 25. 2 Stair, 9. 44, 45. 2 Bank. 9. 75. 2 Ersk. 6. 54. Pitmeddin, July 7, 1627, (306.) Macbraire, 20th February, 1666, (13,861.) Hamilton, 10th February, 1715, (13,803.) Hamilton, 16th February, 1669, (13,827.) Roxburgh, 17th February, 1815, (See 2 Shaw, App. Ca. 18.) Queensberry Cases, 10th March, 1824, (2 Shaw, App. Ca. 43.) Agnew, 22 July, 1828, (ante, III. 286.) Leslie, 13th Feb. 1745, (1723.) Haldane, Dec. 11, 1804, (No. 3. App. B. and M. Fides.) Bowman, 11th June, 1805, (No. 4. Ib.) Elliot, 22d May, 1822, (1 Shaw, App. Ca. 16.) Grant, 9th Feb. 1765, (1760.) Laurie, 21st June, 1769, (1764.) Turner, 3d March, 1820, (F. C.) Moir, 16th June, 1826, (4 S. and D. 725.) Gordon v. Innes, 19th June, 1828, (6 S. and D. 996, affirmed 10th Nov. 1830, (ante, 305.) Bonny, 13th July, 1760, (1728.) Brisbane's Trustees, 26th Nov. 1828, (7 S. and D. 65.)

SPOTTISWOODE and ROBERTSON—RICHARDSON and CONNELL  
—Solicitors.

ARCHIBALD SCOT, Appellant.—*Wilson.*

No. 50.

KER and JOHNSTONE (for LEITH BANK,) Respondents.—  
*John Miller.*

*Bankrupt.*—Circumstances in which (affirming the judgment of the Court of Session) objections stated to a petition for sequestration under the bankrupt statute were repelled.

THE Leith Banking Company are an unincorporated com- Dec. 9, 1830  
pany, consisting of more than six partners. Of these partners, <sup>1st Division.</sup> Archibald Scot, writer in Langholm, was one. He was also  
the bank's agent in that town; and likewise superintended a  
branch of their business established by them, but without

Dec. 9, 1830. license, at Carlisle. The Bank, being dissatisfied with his conduct, displaced him, and incarcerated him for payment of a bill for L.1500. He was also due to them, among other sums, two bills for L.500 each. Of charges on these he presented, but unsuccessfully, bills of suspension and liberation. Having paid, under protest, the L.1500 bill, and obtained his liberation, he, during the temporary subsistence of a sist on one of the L.500 bills, repaired to the sanctuary.

Thereupon a petition for the sequestration of the estates and effects of Scot was presented in the names of 'James Ker and 'Henry Johnstone, managers to, and for behoof of, the Leith 'Banking Company.'

Scot objected, that the Company were unincorporated, and had not complied with the statutory observances requisite to give them a title to sue; but the Court repelled the objection. Then, on the merits, Scot maintained that the debt of L.1500, on which he had been incarcerated, had been paid; that the diligence on which the incarceration had followed was inept; and that there was no legal caption in existence against him when he repaired to the sanctuary, as no caption could have passed on the bill under sist for L.500; consequently, he had never been rendered bankrupt. The Court ordered a minute, stating the grounds on which Scot was a bankrupt when the petition for sequestration was presented. The Bank stated, that Scot had been incarcerated in virtue of letters of horning and caption on the L.1500 bill; and that, although the principal of the debt was paid, the interest remained due; that the caption on the L.500 bill was a valid and legal diligence; that these bills had no connexion with the Carlisle agency; that Scot was under legal diligence at the instance of other individuals; that he was insolvent, and had fled to the sanctuary to avoid his creditors. Scot answered—That he had challenged the L.1500 bill and diligence; that the caption on the L.500 bill was inept, and incurably so; and that it had not been obtained when he went to the sanctuary; that he had not been made bankrupt; that he was not insolvent; that he did not come under the class of persons who are liable to sequestration; and he maintained that all the transactions which had given rise to these questions were tainted by the illegality of the Bank's establishment in Carlisle,—that agency being in direct contravention of the monopoly of the Bank of England, secured by statute; and, consequently, the Leith Bank being versantes in illicito, could not claim the aid or redress of a court of law, as to matters arising out of their illegal acts.

The Court repelled the objections, sustained the title of the Dec. 9, 1830. petitioners, and sequestrated the estate and effects of Scot.\*

Scot appealed.

*Appellant.*—Besides repeating the statement relied on in the Court below, Scot maintained that being a partner of the Leith Banking Company, his estates could not be sequestrated at the instance of that Company, or any person representing it. A company is made up of its partners, and to allow it to apply for sequestration of one of its members, is, in fact, tantamount to sequestrating itself. No doubt, this plea in law was not raised in the Court below; but that is no objection,—at least to a remit, to have the point discussed.

*Respondents.*—This is an objection to the title; but objections to the title were repelled; and that interlocutor has not been appealed against.

*Appellant.*—The objection repelled was the objection to the title of the Bank to sue in the names of Ker and Johnstone. The objection now raised could not have been repelled, for it was not made in the Court below. The omission to appeal against the interlocutor was merely accidental; and, at any rate, the other interlocutor sustaining the title is appealed from; and thus the appellant is quite in form.

LORD CHANCELLOR.—My Lords, as I entertain no doubt whatever in this case, when I look at the facts and the law, and particularly the Act of Parliament, I shall only state, in moving your Lordships to give affirmance to the judgment of the Court below, that this disposes of no question of law not raised in the case. For instance, whether or not one partner may make another a bankrupt, is not to be taken as decided by the present affirmance. We see a certain objection taken to the title to pursue, and we see an interlocutor unappealed from repelling that objection. There has been no valid objection taken upon either record, by the pleadings or the appeal; therefore, this is to be taken to be a judgment simply affirmed in the circumstances of the case. The omission of appealing from that interlocutor is a remarkable peculiarity. How I might have been disposed to advise your Lordships had other circumstances existed, and had the interlocutor been appealed from, and had other questions been raised which are not in the pleadings before us, it is unnecessary now to consider.

The House of Lords accordingly ordered and adjudged that the interlocutors complained of be affirmed.

ALEX. GORDON—MONCREIFF, WEBSTER, and THOMSON—  
Solicitors.

No. 51.

LIEUT.-COL. TAYLOR, Appellant.—*Knight.*SIR WILLIAM FORBES and Co., Respondents.—*Lushington,  
Robertson.*

*Executor—Fraud—Trust.*—Where a party who had money in bank executed a will in which he nominated his son executor, who was partner of a company indebted to the bankers; and the bankers, by authority of the son, transferred the money to his individual account, taking a discharge from him qua executor; and thereafter transferred it to an account in name of the company, whereby the debt due to the bankers was extinguished; and the Court of Session (in a question with a party having a beneficial interest under the will) found the bankers not liable to account,—the House of Lords reversed, and remitted an issue to ascertain whether the bankers were in the knowledge that the money was part of the funds of the defunct, and held by the son, qua executor, and subject to the trusts of the will, and that those trusts were not satisfied.

Dec. 14, 1830. THE late John Taylor, soap-manufacturer at Queensferry, transacted his banking-business with Sir William Forbes and Co., Edinburgh. He assumed in January, 1803, two of his sons, Patrick and William, into partnership with him, under the firm of John Taylor and Sons. On this occasion, he desired Sir William Forbes and Co. to transfer a balance due to him on his account-current to the credit of an account to be kept in name of John Taylor and Sons. Taylor and Sons then ordered the bankers to charge them with L.5000, and place it to the credit of John Taylor's personal account. This was done; and on the 16th of April, 1803, John Taylor executed a deed of settlement, by which he appointed his son Patrick to be his sole executor, and provided, 'that in the event of my having not done so during my lifetime, the said Patrick Taylor shall immediately on my decease, and out of the first and readiest of my moveable estate, either deposit in a bank, or lay out on good landed security the sum of L.5000, and take the bank receipt or bond therefor,' in life-rent (under a certain deduction) to his (testator's) widow, and the fee in certain proportions to his children. He afterwards, in 1807, added a codicil, declaring, that no part of the provisions to his sons should be due or payable to them, until they had settled all debts which they might owe to him as an individual, or to the Company, or debts due by them to any of their brothers. He survived above ten years, and at his death, in August 1813, the L.5000 at his personal credit amounted, with interest, to L.6500. The appellant, Colonel James Taylor, was one of his sons, and was at this time in the army and abroad.

2D DIVISION.  
Lord Cringletie.

The Company continued business as before, but in consequence of an imprudent extension of business, and the state of their account, the bankers remonstrated, and on 14th June, 1814, wrote to them: 'Your account appears to have upwards of L.3000 of uncovered advance at present. We therefore beg you will, without delay, bring it into order. We should be glad to see one or other of you to-morrow, or the first day you are in town.' Having made other advances, they on the 30th July again wrote: 'In doing this you must be aware it will make the advance on your account greatly exceed the amount of your bills—a circumstance we had hoped you would, by all means, have avoided. As it must be immediately brought into order, we shall expect to see one of you on Monday first.'

A meeting then took place between the bankers and Patrick Taylor, the result of which was, that on the 5th of August, he granted a discharge of the balance standing at the credit of his father's account in these terms:—'Considering that my deceased father, by his disposition and deed of settlement, dated the 16th day of April 1803, and registered, along with a codicil thereto, in the books of Session the 24th day of September 1813, gave, granted, assigned, and disposed to and in favour of me, his eldest lawful son, whom failing, to his other children, in their order; but with and under the burdens and provisions therein specified,—generally, all and sundry his lands and heritages, with all debts, heritable and moveable, and whole goods, gear, sums of money and effects which should pertain and belong to him at the time of his death, with the whole vouchers and instructions thereof; together with all right, title and interest which he had, or could pretend to the said lands and heritages, means, estate and effects which should belong to him at the time of his death, as aforesaid; and he nominated and appointed me, whom failing, his other children, in their order, to be his sole executor, and intromitter with his goods, gear, and effects; but for the ends and purposes therein specified, excluding all others from that office, as from the said deed of settlement itself will more fully appear. And now, seeing that the said Sir William Forbes, James Hunter, and Co. have instantly made payment to me, as executor foresaid, of the aforesaid sum of L.6751, 8s. 7d. sterling, whereof I hereby grant the receipt, renouncing all objections to the contrary. Therefore I do, by these presents, exoner, acquit, and simpliciter discharge,' &c.

At this time, Patrick Taylor had not been confirmed executor, and of course had not found caution; and it was admitted

Dec. 14, 1830. that no actual payment was made to him, but that the bankers transferred L.5000 to a private account, opened for the first time in name of Patrick Taylor as an individual, and the balance (being the interest) L.1751, 8s. 7d., was placed to the credit of the account of John Taylor and Sons. At this date, the balance due by that Company amounted to between two and three thousand pounds. By applying to it the above sum of L.1751, 8s. 7d. it was reduced to that extent, and the bankers held besides bills pledged by the Company.

The banking operations were thereafter renewed; but the Company having again overdrawn their account to the extent of L.5000, the bankers obtained from them in March, 1816, an heritable bond for that amount.

On the 16th July, 1817, Patrick Taylor, pressed by the necessities of his house, and alarmed at the remonstrance of the bankers, directed them to transfer from his private deposit account L.5000 to 'John Taylor and Sons' separate account,' to place L.360 to the credit of John Taylor and Sons' ordinary account, and to apply L.250 to payment of interest due on the heritable bond—these two last sums being the accumulated interest on the principal of L.5000. It was admitted, that the bankers were at this time aware of the approaching insolvency of the Company; and a week afterwards the Company became bankrupt. The bankers did not claim on the estate, but in February, 1818, transferred the L.5000, with interest, from the separate account of John Taylor and Sons, to the credit of the account-current of the Company, and thus liquidated the balance due by the Company to them.

Thereafter the Company settled with their creditors by a composition.

During these transactions Colonel Taylor had been abroad; but on his return, in 1823, he raised an action before the Court of Session, against Patrick Taylor, William Taylor, and Sir William Forbes and Co., founding on the deed of settlement, and setting forth that Sir William Forbes and Co. although fully aware of the nature of the deed, and that the L.5000, and interest thereon, formed part of the trust-fund, had accepted of a discharge without requiring Patrick Taylor, the executor, to make up title by confirmation; and that out of the funds they had paid themselves a debt not due to them by the deceased, but due by the Company; that Patrick Taylor, in granting such a discharge, had acted fraudulently, and that Sir William Forbes and Co. must be held to have participated in the misapplication of the money, and concluding for payment

of L.5000 under certain deductions. Sir William Forbes and Dec. 14, 1890. Co. maintained in defence, that confirmation was not necessary; that they were unaware of the specific nature of the trust; and that in the manner the funds in question were dealt with, they had not been guilty of any misapplication.

The Lord Ordinary sustained the defences for Sir William Forbes and Co., and found them entitled to expenses. And the Court, (June 9, 1827,) after considering writings recovered, condescendence, and answers, adhered.\*

\* 5 Shaw and Dunlop, p. 785.

NOTE.—The Lord Ordinary considers that the fact on which the pursuer founds his argument, in order to subject Sir William Forbes and Company to payment of his claim, is void of foundation. It is admitted that the late John Taylor, as long ago as the year 1803, put into the house of Sir William Forbes and Company, in his account-current with them, L.5000, which stood in his own name at his death, and with interest thereon, amounted to greatly above L.6000, but that sum was not appropriated by Mr Taylor to any particular purpose whatever—certainly it was not deposited with the Company on a note by them, payable to Mrs Taylor in liferent, for her liferent use only, and his sons in fee, subject to the deduction mentioned in his will, dated in September, 1813. The money lay as a balance due to him in his account-current, and was subject to the call of his eldest son, Patrick Taylor, who was his father's sole executor. Accordingly he did call for the money in 1814, when L.5000 of it was transferred to the individual account of Patrick Taylor, and the balance to the account of John Taylor and Sons, of which company Patrick was a partner. On this occasion, the will of John Taylor was shown to Sir William Forbes and Company, who remitted it to their agent, Mr Thomas Cranstoun, who advised them that they were in safety to pay to Patrick Taylor, as he was one of the nearest of kin, and sole executor-nominate of his father. Accordingly, they transferred the money in the manner already described, and took a discharge, without requiring Patrick to be at the expense of a confirmation. The judgments of the Court warrant such a payment, and indeed this point was not disputed at the Bar; but it was said that the Company saw the will, thereby knew the purpose for which the L.5000 was destined, and ought not to have paid it without confirmation, in which caution would have been found in the Commissary Court, whereby the pursuer would have recovered the money. But admitting for a moment that the Company had examined the will, all that they would have seen was, that John Taylor ordered his executor, if he had not done so himself in his lifetime, to deposit in a bank, or lend on heritable security, L.5000 for the purposes above mentioned. But they could not know that he had not deposited money in some other bank, or lent it on heritable security on a note or bond, payable to his wife in liferent, and his sons in fee. Sir William Forbes and Company were certain that the money in their hands had not been so applied, because it just stood as an article in John Taylor's current account. The Lord Ordinary, therefore, thinks that the basis on which the pursuer founds his charge of error or oversight in that Company is wanting, and that the Company were warranted in making the payment to Mr Taylor's executor-nominate, and are not liable to repay the whole or any part to the pursuer.

On advising representation for the pursuer, it appears to the Lord Ordinary, that according to the principles assumed by the representer himself, he is wrong in his conclusions. The great and leading principle of law on which he founds is,



Dec. 14, 1830. Colonel Taylor appealed.

*Appellant.* (1.) Supposing that the respondents were in bona fide throughout these transactions, still they, having paid to an executor nominate, unconfirmed, paid to a party who was not in-titulo to receive or discharge the money belonging to the de-

that it was necessary for Patrick Taylor to have been confirmed executor to his father, in order to enable him to grant a valid discharge to Sir William Forbes and Company, and this because he was the eldest son and heir of his father, and a stranger, in so far as regards the moveable succession. The respondent, however, admits frequently, that a certain description of executors may, on voluntary payment by the deceased's debtors, validly discharge them without having confirmed; and it has been so decided again and again. But then the executors, to whom the privilege belongs, are only the deceased's nearest of kin as to the moveables, or his general dispoonees, who as such represent him, and are alone interested in his succession. Now the fact is, that by the law, an eldest son and heir of a defunct is as much nearest in kin to his father as any of the other brothers or sisters, provided he chooses to sollicit the heritage; and by the deed executed by the late John Taylor, his eldest son Patrick was made an equal sharer with his brothers and sisters in the succession of their father. 2d, Patrick was the general dispoonee of his father, and declared to be the sole intrinmitter with his estate, property, and effects of every sort. The deed declares, "That immediately after my death, the said Patrick Taylor, whom falling, my other children, in the order of their succession as aforesaid, shall realize the whole of my heritable and moveable estate hereby conveyed, and after payment of all my debts as aforesaid, divide the same equally between him" and his brothers, of whom the pursuer is one; and then by the deed, Patrick Taylor is named the sole executor. Thus, Patrick Taylor is one of the nearest of kin to his father, named the sole executor; and added to this, he is the general dispoonee directed to realize the whole heritable and moveable estate, in which situation the Lord Ordinary has no doubt, that by the law as it stood, when Taylor uplifted the money from Sir William Forbes and Company, he was entitled to grant a valid discharge, although he had not been confirmed. The principle to which the law looks is, whether the money has been uplifted, and the discharge granted by the person truly entitled to receive and discharge—and if these have been done by that person, the discharge is valid. Perhaps, in former days, one of the reasons for making confirmation necessary was, that the executor found security for the faithful discharge of his duty; but these rules (whether rightly or wrong is not the question) have been long departed from. In those days, confirmation of the whole succession was necessary to vest it in the executor and transmit it to his next of kin; but now, and for a long time past, confirmation of a pound out of thousands vests the office, and transmits the right of succession to the nearest of kin of the executor. Neither is confirmation at all requisite in many cases; e. g. it is not necessary wherever actual possession can be taken, whereby the whole of a father's personal succession can be laid hold of without confirmation. In the same way, nomina debitorum can be vested without confirmation, if the debtor consent, by granting a bond of corroboration of the old debt, or a new bill for it to the executor. 20th February, 1751; Spence, reported by Kilkerren, Service and Confirmation, No. 9, Fac. Coll. 19th June, 1782; Watson v. Marshall. Payment, too, even by the mandate of the next of kin and general dispoonee, though unconfirmed, is an effectual payment. 20th July, 1784; Buchanan and Auld v. Grant; Morrison, p. 14378. The only purpose, therefore, of confirma-

ceased. They have consequently run the hazard of his misap-  
 plying the money, and must make good the loss which his mis-  
 application has caused to the appellant. Dec. 14, 1830.

(2.) But independent of this plea, the respondents, by being made aware of the nature of the trust-deed, and of the destination of the money standing at the individual credit of the deceased, were put upon their guard; and if they paid it away, in any other manner than directed by the deceased, they are liable to the parties injured. It is a settled point, that if a party has had, under such circumstances as the present, the deed in his own or his agent's possession, the presumption arises, that the party made himself acquainted with the contents. It is culpable negligence in the party not to do so. The whole *res gestæ* prove that the bankers knew they were dealing with the money of the deceased. The necessities of the Company had placed Patrick Taylor in their hands, and the whole system of transferring the principal of the money of the deceased to the credit of Patrick, as an individual, (not as executor,) passing the interest at once

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' alon, before the late statute, was to vest an universal title in the executor and general donee, and thereby transmit to his nearest of kin the subjects or nomina debitorum, of which he had not obtained possession. But payment to him, or bonds or bills granted to him, though unconfirmed, of debts due to the deceased, have long been considered to be effectual. What, then, is the matter of fact in this case? The late John Taylor had, in 1803, put into Sir William Forbes and Company's house L.5000, which, at his death in August 1813, remained in their books in his own name alone, without appropriation of any sort, and amounted to between L.6000 and L.7000. This sum remained in name of John Taylor for twelve months, namely, till the 5th of August 1814, when the defender Patrick Taylor uplifted the principal and interest, amounting to L.6751, 8s. 7d., and granted them a full discharge, as sole executor and intromitter with his father's goods, gear, and effects. This sum of L.6751, 8s. 7d. he might have carried out of the house and disposed of as he chose; and he placed L.1751, 8s. 7d. of it in account with John Taylor and Sons, and the balance of L.5000 he paid into an account in his own name opened in the books of the Company, for which they gave him a deposit receipt. And it is admitted, that this sum of L.5000, in name of Patrick Taylor, was not uplifted by him, that is discharged, to Sir William Forbes and Company, for three years, viz. till 1817. The Lord Ordinary cannot accede to the argument, that there was no payment by Sir William Forbes and Company, because the money happened to be placed in their hands again. The debt due by them to the deceased John Taylor was paid to his sole executor and general donee, and discharged by him, and was as effectually extinguished as it could be; and if the Company could not be made liable to pay the money over again if it had been carried out of their house, the Lord Ordinary cannot think that they are liable for it, because it was at the time lodged with them as bankers. The representer has quoted letters from his brothers, and a clerk of theirs, to make it appear that these matters were concocted by the late Mr Samuel Anderson, in order to cover the advances of Sir William Forbes and Company to John Taylor

Dec. 14, 1836. to the credit of the Company, then passing the principal from the individual account to the Company's separate account, preparatory to its being applied in liquidation of the ultimate balance due by the Company; betrays the knowledge of the Bank: that they were devising a scheme, whereby to pay themselves the debts due by the executor (or his partners) in his private or company character, out of trust-money, which did not belong to the executor, in his private or company character, but belonged to a party who was not in any way, or to any amount, debtor to the Bank. It is a rule in equity, long sanctioned by the practice of the Court of Chancery in England, and equally well known in the law of Scotland, that the rights of third parties are not to be injured by the collusion—even by the negligence, of individuals who deal with executors, or executory effects. If a banker concert with an executor, and obtains the testator's property at an under value, or applies the real value in payment of the debts due by the executor to the banker, or in any other way contrary to the duty of the office of executor, such concert, or even bare knowledge of the misapplication in the banker's favour, will make him liable for the full value. The fact of the property being, or having been trust-

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'and Sons. The representor must be sensible that these letters are in no way  
'evidence against that Company; nor is it decorous to make such an insinuation,  
'when, in particular, it is contradicted by the fact; for if that had been the view  
'of the Company, they would have made Patrick Taylor pay the whole L.6751  
'into the account of John Taylor and Sons. Instead of which, Patrick paid L.5000  
'to an account in his own private name, on which he might have operated to the  
'last farthing. The Lord Ordinary remarked in his note, when he pronounced  
'the first interlocutor complained of, that Sir William Forbes and Company could  
'not know that John Taylor had not lent out on heritable security L.5000, or  
'placed that sum in the hands of other bankers or individuals. They probably  
'saw, that by his will he directed his son to employ that sum, if he had not done  
'so himself; but that was nothing to the purpose, as they could not know whether  
'he had done so or not. Certain it was, that the L.5000 in their house was not  
'deposited as applicable to any particular purpose; and in conformity to the liberal  
'practice of that Company, they did not put Mr Taylor to the expense of a com-  
'firmation, when it was not legally necessary for their own safety. As to the  
'claim of preference urged by the representor on the L.5000, because that sum is  
'shown to have been paid to Sir William Forbes and Company, it appears to be  
'out of all sight imaginary. It is certain by law, that if a fund belonging to a  
'deceased, can be pointed out as still belonging to, or under the administration of  
'his executor, a creditor of the deceased's is preferable to the creditor of the execu-  
'tor; but the Lord Ordinary never heard that a creditor of the executor, who  
'seven years before had received payment of his debt, shall be obliged to refund it  
'to a creditor or legatee of the defunct, because it can be shown, that the payment  
'was made with money once belonging to the deceased, but which for years was  
'under the management of the executor.'

funds, is a notice to the party dealing with the executor to be Dec. 14, 1880, on his guard.

**LORD WYNFORD.**—The question here, then, will be, whether Sir William Forbes and Co. applied this money to the extinction of the debt due to them by Taylor and Co., knowing the money to belong to the deceased. Is this not just a case for a Jury?

*Lushington, for the Respondents.*—We cannot accede to that suggestion, as we held that there is proof enough for the respondents' exoneration. There is no evidence that the respondents saw the settlement; and when it was exhibited to their agent who framed the discharge, it was merely to show that the holder had a title to discharge. There was no necessity for a confirmation. That is a point firmly fixed in the law. Neither was there anything in the transactions, which could have justified suspicion on the respondents' part, that the executor was guilty of misapplication. The testator might have previously to his death, and out of other property, fulfilled his intentions as to his family—an event alluded to in the very settlement itself. Or the executor might have paid the provisions under the settlement out of his private funds, and have been consequently entitled to deal with the £5000 as his own. Although embarrassed, the Company were not so much indebted to the Bank, as even to have made the Bank desirous of a transfer from the private account. Indeed, the first transfer could have done the Bank little good, as it left the money entirely at the private party's disposal, and the second transfer was by the party's free choice; and, when entered, the Bank were justified in making advances on its faith, as a fund of credit.

**LORD WYNFORD.**—If an executor has money in the banker's hand, he can draw it out, and the bankers are not bound to watch its appropriation. But if the money remain in the banker's hands, and they apply it to the demands of the bank, are the bankers not liable?

*Lushington.*—But how do bankers know that the executor has not had to pay, out of his own funds, debts due by the deceased? That would virtually relieve, pro tanto, the assets from the trust. When once assets are transferred, (and a banker has no power to refuse to transfer,) the assets become like any other money. They cease to have any distinguishing mark.

*Knight, for the Appellants.*—In the circumstances, the bankers could have refused to pay to the executor or to his order. Supposing the first transfer were fairly made, it clearly was a transfer under the trusts of the will. The bankers held the sum transferred as trust money, and under notice. In the ordinary

Dec. 14, 1880. mode of doing business, the bankers might have paid; but the transaction of which we complain was not ordinary business.

**LORD WYNFORD.**—Then you hold, that when, in one sense, by the transfer the character of trust money was gone, the bankers could object to pay; giving as a reason, that they were sure the executor would misapply the money when paid?

**Knight.**—We do not consider that the money lost its character of trust money; and we think that if the bankers know that the executor contemplated a misapplication, they have not only a right to refuse to pay, but, if they do pay, they pay at their peril. How much more so, where they themselves are to be a party to the misapplication? We offered, but were not permitted, to prove facts very material in reference to this view of the case.

**LORD WYNFORD.**—If a person proposes to prove a fact, and the other party objects, it has been well said, that that fact must in argument be taken as true. If, then, any material facts have been averred here, and not allowed to be proved, I don't see how we can escape at least sending this case down.

**Knight.**—If the judgment cannot stand on the facts as admitted, we are anxious, in order to save expense and time, to obtain a judgment of your Lordships, declaratory of your opinion, to be added to the reversal:—That having regard to the facts appearing on the proceedings in this cause, the sum of L.5000 ought still to be considered in the hands of Sir William Forbes and Co., liable to be applied as the assets of the testator, and subject to the legal demand on his assets.

**LORD WYNFORD.**—The bankers have paid over part of these assets to the account current of the Company, at the desire of Patrick Taylor; for instance, the balance due by the Company on the 5th August,—and you say that the bankers are also liable for that amount?

**Knight.**—If they have made that payment, they have done so in their own wrong. They were entitled to apply all that stood at the proper credit of the Company to the debts of the Company; but they could not be justified in doing any more. After the notice they had received, if they passed the assets to themselves in payment of a company debt due to themselves, they dealt with the trust money in a way they were not entitled to do. The money could not have reached a company creditor, unless under a manifest breach of trust.

**LORD WYNFORD.**—What do you say continued to be the situation of the L.5000, after the balance due on the 5th August was deducted?

*Lushington.*—Of that date there was a transference to the separate account of the Company; and thus the sum transferred became a security fund; a fund for future advances to the Company, and which fund accordingly was drawn upon.

*Knight.*—The amount remained at the credit of the separate account of the Company until after the bankruptcy; and then the bankers transferred it to the Company's current account. But this they did without authority of any kind.

**LORD WYNFORD.**—My Lords, this is an action brought by the present appellant, as one of the children of a person of the name of John Taylor, claiming against these respondents the sum of L.5000 and interest. This sum of L.5000 had been deposited in the hands of the respondents, who are bankers, by the father of the present appellants, and it remained standing in his name in the books of the respondents at the time of his death, and for some time afterwards. This money had been standing so long in his name in the hands of the respondents, that it had produced interest to the amount of L.1700. By a deed of disposition, which was to take effect after his death, John Taylor gave all his property, including the L.5000 and the interest, to Patrick Taylor, in trust; the interest of the L.5000 for his widow, for her life, and the principal at her death for his children. John Taylor had been a partner in the house of Taylor and Sons. The partnership was carried on under the same firm after his death, but his representatives were not partners. At the time of his death, the firm was in a very flourishing state, but afterwards it became embarrassed, and was much in debt to the respondents, who strongly pressed the copartners to reduce their balance. In consequence of these applications from the respondents, Patrick Taylor transferred the L.1700, which was the interest on the L.5000, to the credit of the account of John Taylor and Sons, and thus reduced the balance due from that house to the respondents. He at the same time caused the L.5000 to be passed from the name of John Taylor to that of Patrick Taylor; and afterwards being farther pressed, Patrick Taylor transferred the L.5000 from his separate account to the credit of a new account opened in the name of John Taylor and Sons' separate account. Of L.610 of interest, L.360 was passed to the credit of John Taylor and Sons' ordinary account, and L.250 more was applied towards the payment of the interest of an heritable bond some time before granted by Taylor and Sons to the respondents. In a week after this the firm became bankrupt, and being largely indebted to the respondents, they afterwards passed the L.5000 standing in John Taylor and Sons' separate account to the credit of that company's general account. It will be observed, that all those debts from John Taylor and Sons to the respondents were contracted after John Taylor's death, and that his estate was not responsible for the payment of their debts. The professional adviser of the respondents was in possession of the deed made by John Taylor, and must therefore have known of the trusts upon which

Dec. 14, 1830. Patrick Taylor held that money. The respondents must know that this money originally belonged to John Taylor. It was paid into their house by John Taylor. They would not have allowed Patrick Taylor to transfer this money, without enquiring what authority he had to make such transfer. It appears that they did make that enquiry, and that their law-agent was furnished with the deed. He must have known, and the respondents must be presumed to have known, that Patrick Taylor's right to deal with this money was only as a trustee. If they did know that he was only a trustee, they could not be permitted to assist him to act in violation of his trust. They could not take it from him in satisfaction of a debt due from Patrick Taylor and his partners to themselves. Patrick Taylor was committing a fraud on those for whom he was a trustee, by thus disposing of the trust property. The respondents, by accepting this money from him, if they knew for what purpose it was given to him, were accessories to his fraud. Erskine, Bell, and many other Scotch writers, have said that the property of a deceased person must be applied according to the disposition made of it by him, and must not be made use of to pay the debts of the persons to whose care the deceased commits it. The manner in which this money was transferred from one account to another, until, after several shifts, it was brought within the reach of the respondents, showed, I think, that their legal adviser was aware that it required very dexterous management to make this money applicable to the payment of the debts of Taylor and Sons. Such management may render it difficult to get at the true state of the case; but when it is ascertained that this was John Taylor's money, and was only in the hands of Patrick upon trust, and that such trust was known to the respondents, or their legal adviser, no contrivance of that legal adviser can enable the respondents to keep that money for a debt due to them from Taylor and Sons, and for which John Taylor was not responsible. I therefore move your Lordships that the interlocutors of the Court of Session be reversed, and that this case be sent to a jury to ascertain whether the whole of the L.5000, and the interest due on that sum, or what portion of such principal and interest has yet been detained by the respondents in satisfaction of debts that became due to them from John Taylor and Sons after the death of John Taylor. Secondly, Whether at the time this money was taken by the respondents in payment of the debts of Taylor and Sons, the respondents did not know that it was part of the estate of John Taylor, and was held by Patrick Taylor only as a trustee.

The House of Lords accordingly ordered and adjudged that the several interlocutors complained of be reversed. And it is farther ordained that the cause be remitted back to the Lords of Session in Scotland of the Second Division, with an instruction to them that they do direct a trial by jury to be had upon the following issues:—Whether any, and what part of the L.5000 transferred by John Taylor to a separate account in his own name in 1803, subsequently transferred in 1814 into the name

of Patrick Taylor, and again in 1817 transferred into an account Dec. 14, 1830. called the separate account of John Taylor and Sons, has been received by the respondents in payment of a debt due to them from the firm of Taylor and Sons? Whether, when the respondents received such money, they knew that it was part of the estate of John Taylor, and that Patrick Taylor was possessed of that money as the executor of the said John Taylor, and held it subject to the trusts declared by that will, and that the said trusts were not satisfied? And that after the trial of such issues, the said Lords of Session of the Second Division do proceed further in this cause as shall be just.

*Appellant's Authorities.*—3 Ersk. 9. 27, and 33. Creditors of Murray, Nov. 27, 1744, (Elchies, No. 15, voce Executor.) Alison, Nov. 1765, (15,132.) Tait, Feb. 12, 1779, (3142.) Bell, Nov. 28, 1781, (3861.) 2 Bell's Com. p. 96. Andrew v. Wrigley, (4 Brown, p. 124.) Scott v. Tyler, (8 Dickens, p. 712, and 2 Brown, p. 481.) Hill v. Simpson, (7 Vesey, p. 132.) M'Leod v. Drummond, (14 Vesey, p. 353.) Keane v. Roberts, (4 Maddocks, p. 494.) Watkins v. Cheek, (2 Stuart and Simons, p. 205.)

*Respondents' Authorities.*—Minorman, Nov. 24, 1630; Cliftonhall, Jan. 1687, (1 and 2 Brown's Sup. 316—99.) Dobie, July 8, 1707, (14,390.) Dickson, Nov. 22, 1711, (14,392.) Buchanan and Auld, July 20, 1784, (14,378.) Smith, May 27, 1801, (App. voce Sub. and Cond., Inst. No. 1.)

E. J. SCOTT,—SPOTTISWOODE and ROBERTSON,—Solicitors.

MALCOLM M'NEILL, Appellant.—*Wetherell—Stewart.*

No. 52.

MRS M'NEILL, OR JOLLY, AND HUSBAND, Respondents.—  
*Pollock—Robertson.*

*Interest.*—Circumstances in which it was held, (reversing the judgment of the Court of Session,) that a party was not liable for compound interest on an heritable bond granted in 1787, and for payment of which action was raised in 1814, but not proceeded in till 1824, although the delay was alleged to have been caused by the improper acts of the debtor.

On the 20th of August, 1787, the late Daniel M'Neill, Esq. Dec. 22, 1830.  
of Gallochilly, granted to the late Dr James M'Neill an heritable  
bond for L.1000, payable at the first term of Whitsunday, with  
the lawful interest to that term, and yearly during the non-  
payment payable at the usual terms, together with penalty in  
common form. Sasine was taken in December, 1787, and the  
instrument recorded in February, 1788. The interest was paid

1st Division.  
Lord Eldon.



Dec. 22, 1830. till Martinmas, 1792; in 1794, M'Neill of Gallochilly died, and was succeeded by his eldest son, on whose death, in 1801, the estate descended to Hector Frederick M'Neill.

In the month of February, 1806, Dr M'Neill subjoined and signed the following note to a state of accounts made up with Hector M'Neill, but which the latter did not subscribe:—  
 ' Edinburgh, 21st February, 1806.—The above state of accounts  
 ' contained in the preceding page has been this day viewed and  
 ' examined by Captain Hector M'Neill of Gallochilly, and Dr  
 ' M'Neill of Stevenstown, as being the parties concerned,  
 ' amounting to the capital sum of L.2516, 0s. 8d. sterling as at  
 ' 17th current, when both parties declared their satisfaction  
 ' that all the particulars therein mentioned were justly and  
 ' fairly stated; when Dr M'Neill, as a testimony of his regard  
 ' for the present representative of the Gallochilly family, frankly  
 ' released the said Captain Hector from all the principal that  
 ' he had advanced to purchase the commission from Captain  
 ' Douglas to the late Daniel M'Neill, per Mr Balderstone, writer  
 ' to the signet; And also, as a farther evidence of his friend-  
 ' ship towards said family, Dr M'Neill grants L.50 sterling to  
 ' purchase a gown and other articles of dress, suiting her own  
 ' very genteel taste, and as may best please the present Mrs  
 ' M'Neill of Gallochilly. Accordingly, the above capital, at the  
 ' above date, is hereby restricted to the capital sum of L.2136  
 ' sterling, as the small fraction is hereby also cancelled: and the  
 ' above restricted capital, with interest from the above date, being  
 ' paid soon, Dr M'Neill shall formally discharge said Hector  
 ' M'Neill, Esq. of all the above particulars. In witness whereof,  
 ' this docquet, and another duplicate hereof, are wrote by said  
 ' Dr M'Neill, and signed by both parties, place and date as  
 ' above; and at same time it is the meaning of the parties,  
 ' that in case of any error or deficiency in vouchers, that the same  
 ' shall be amicably adjusted; and this account is liable to fu-  
 ' ture revision on vouchers being produced.'

Thereafter, on the 25th of December, 1811, an arrangement took place between them, and the following missive was subscribed by them:—

*' Edinburgh, 25th December, 1811.*

' As you have this day given me your bill for L.230 sterling,  
 ' I bind myself to give you credit for the same in my account;  
 ' and I further bind and oblige myself, in consequence of this  
 ' payment from you, to free you from all bonds and other  
 ' claims that I may have against you, on condition that you

' grant me your bond of annuity during my life, for a sum equal Dec. 32, 1830.  
' to the balance you owe me, after deducting this L.230, at the  
' rate of  $7\frac{1}{2}$  per cent.

(Signed)

' JAS. M'NEILL.

Agreed

' HECTOR F. M'NEILL.'

At this time Dr M'Neill was under trust; and his trustees having protested against the validity of this transaction, Hector M'Neill, on the 10th of January, 1814, raised an action of implement, and the trustees thereupon raised an action of reduction, on the grounds of imbecility and error on the part of Dr M'Neill. Lord Alloway, on the 24th of June, 1814, decerned in the reduction, and absolved from the action of implement, and to this judgment the Court adhered in July, 1816.

Soon thereafter, (Feb. 1817,) the trustees of Dr M'Neill raised an action against Hector M'Neill, founding on the bond, and concluding for payment of the ' principal sum of ' L.1000 sterling, with the sum of L.240 sterling expenses incurred through failure, together also with the due and lawful ' interest of the said principal sum from the term of Martinmas ' 1792, and thereafter during the not payment,' &c. Dr MacNeill died in the month of May, leaving a general disposition and deed of settlement in favour of his natural daughter, the respondent. This deed was challenged by his heir at law, which gave rise to a great deal of litigation, and was not terminated till the end of the year 1822; and in consequence thereof (as was alleged) the procedure in the action on the bond was superseded. An appeal had also in the meanwhile been entered against the judgment, setting aside the transaction of December, 1811, but the judgment was affirmed on the 21st May, 1824.\*

The action on the bond being then revived, no objection was made to decree for the principal and simple interest; but the respondents, as in right of the trustees and Dr M'Neill, claimed that the bygone interest due at Martinmas 1811, should be accumulated as of that date with the principal sum, and that thereafter the interest should be accumulated annually. Lord Eldon, on the 12th of November, 1825, repelled ' the claims of ' the pursuers (respondents) for compound interest on the heritable debt libelled, and appointed them to give in a state of the ' sum due under the heritable bond with simple interest.' The respondents having reclaimed, the Court, on the 26th of May,

\* 2 Shaw, App. Ca. 206.

Dec. 32, 1830. 1832, 'altered the interlocutor of the Lord Ordinary complained of; sustained the claim of the pursuers for compound interest on the heritable debt libelled; found that the pursuers are entitled to have the bygone interests, at the rate of five per cent per annum, accumulated on the 26th day of December, 1811 years, with the principal sum, and also to have the same and accruing interests accumulated at the foresaid rate at the end of every two years thereafter, until the whole are paid up; and remitted to the Lord Ordinary to proceed accordingly; and further, found the pursuers entitled to the expenses of process.\*

Hector M'Neill thereafter died, and the appellant, Malcolm M'Neill, having succeeded to the estate, was sisted as defender in his place.

After some procedure before the Lord Ordinary, the interest was accumulated, and interim decree issued for L.3300.

Malcolm M'Neill appealed.

*Appellant.*—1. The judgment of the Court was incompetent, because the action was libelled upon a bond which stipulated that only lawful interest should be paid, and the conclusion of the summons was limited to that demand, whereas the Court have awarded that which is not warranted either by the terms of the bond or the summons. In order to make such a demand, it ought to have been specially concluded for; but it was not.

2. Accumulation of compound interest upon a loan of money is contrary to the established rules of the law of Scotland. To this there are no doubt exceptions, but none of them apply to the present case, and they fortify the general rule. The first relates to cautioners paying on distress; the second to the effect of denunciation on letters of horning; and the third to questions arising between tutors and their wards, or factors and their constituents. The present, however, is a case simply between an ordinary debtor and a creditor holding a security. The only one at all approaching in similarity to the present, is that of the Duke of Queensberry's executors v. Tait. But in that case, Mr Tait insisted on retaining a large sum of money in security of a right of relief, and the Court held, that although he was entitled to the right of retention, he could not make profit by it, and therefore ordered bank interest to be accumulated.

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\* 4 Shaw and Dunlop, 620.

*Respondents.*—1. As the bond stipulates for lawful interest, Dec. 22, 1830. and the summons concludes in the same terms, it is clear that if the judgment be well founded on the merits, that there is no objection in point of form, because the Court have only awarded what they considered to be lawful interest.

2. It is true that accumulation of interest is not, in strict law, absolutely due, but the Court has an equitable power to allow compound interest at such periods of time as the circumstances of the case may in reason and justice require. This was done in the cases of Hamilton and of the Queensberry executors, and was recognised by this House in that of *Montgomerie v. Wauchope*, and in the Court of Chancery in that of *Raphael v. Bohen*. It is no answer to say, that in some of these cases the parties stood in the relation of tutor and ward, or factor and constituent, because, although this may have been the ground of claim, they truly stood in the position of debtors. In the present case, the circumstances warrant an accumulation. The recovery of payment was prevented by the fraudulent act of Hector M'Neill, in 1811—an act which he attempted to support by a litigation which did not terminate till May, 1834. During the intervening period, therefore, he was possessing the money and the interest in virtue of his own wrong, and contrary to the right of the respondents.

The House of Lords ordered and adjudged, That the several interlocutors complained of be reversed: and it is further ordered, that the cause be remitted back to the Court of Session, to ascertain what is due to the pursuer on the heritable bond, with simple interest thereon, to be calculated on the principal debt, and to proceed accordingly without prejudice to such claim, if any, as the said respondents may be enabled to make for any part of expenses of process incurred prior to the date of the interlocutor of the Lord Ordinary of the 12th, and signed 16th Nov. 1835; or to the objections which the appellants may be enabled to make against such claim.\*

*Appellant's Authorities.*—(1.)—4 Ersk. 3. 3.; 4 Bankton, 536; Fraser, Jan. 22, 1679, (564.)—(2.)—3 Ersk. 3, 81; A. S. Feb. 1, 1610, and Dec. 21, 1690, Stat. 1621, c. 20; 1 Stair, 15. 6; 1 Bankton, 21. 9; Bradd, Jan. 23, 1669, (16,411); Dunn, Feb. 12, 1790, (16,436); Campbell, March 3, 1802, (No. 4, Appellate, Annual Rent); 2 Atkins, 331; 1 Vesey, 99 and 451.

*Respondents' Authorities.*—Hamilton, Feb. 23, 1813, (F. C.); *Montgomerie*, April 8, 1816, (4 Dow, 109); 11 Vesey, 92; *Queensberry Exec.* May 23, 1822, (1 Shaw and Dunlop, 428.)

SPOTTISWOODE and ROBERTSON—S. S. BELL—Solicitors.

\* This case was heard by the Lord Chief Baron, (Lyndhurst,) but no opinion was delivered.

No. 53. **WEDDERBURN DUNDAS, Appellant.**—*John Campbell—Jervis.*

**ROBERT DUNDAS and OTHERS, Respondents.**—*Knight—James Campbell.*

*Approbate and Reprobate—Foreign.*—A domiciled Scotsman having executed, in Scotland, a deed of settlement conveying to trustees his whole property, including an English estate, which was probative according to the law of Scotland, but defective in point of form as to the conveyance of the English estate: found, (affirming the judgment of the Court of Session,) that the heir to the English estate could not take it, and at the same time claim a provision made to him in the trust deed.

Dec. 22, 1830. **THE** late General Francis Dundas, a native of Scotland, was proprietor of the estate of Sanson Seal, in England, and also of a small landed property near Edinburgh, besides considerable moveable funds. He resided, and was domiciled in Scotland, where he married, and had several children. On the 14th of April, 1818, he executed, according to the forms of the law of Scotland, a disposition and deed of settlement in favour of trustees, by which he specially conveyed to them the estate of Sanson Seal, and his whole other heritable and moveable property, for the purpose of converting them into money, and dividing the free residue among his children in such proportions as he should direct, 'and failing any such appointment or division by me, equally and proportionally share and share alike among the said children.' This deed was tested in presence of only two witnesses, whereas, in order to form an effectual conveyance of the English property, it ought to have been subscribed before at least three witnesses. He died in January, 1824, leaving four children; the appellant was the eldest. The value of the English estate was estimated at L.14,000, while the heritable and moveable property in Scotland amounted to about L.37,000.

In consequence of the informality of the deed, the appellant, as heir-at-law, claimed right exclusively to the English property, and he also claimed an equal share of the other funds. This was resisted on the part of the younger children, who maintained that he was bound either to collate the English property, or to abandon all claim under the deed. To settle this question, the trustees brought an action of multiplepounding and declarator before the Court of Session, concluding, 'That it should be found and declared that the said Wedderburn Dundas is not entitled to an equal share with the other children of the said General Francis Dundas of the lands, estates, heritages, debts,

' means, and effects, conveyed as aforesaid by his said father, Dec. 22, 1830.  
 ' or to any benefit whatever under the foresaid trust-disposition  
 ' and settlement, without collating the foresaid property called  
 ' Sanson Seal, with the pertinents, and bearing, in respect of  
 ' that property, a proportional share effeiring to its value or  
 ' yearly free rental, of the expenses of management incurred,  
 ' or to be incurred, by the pursuers during the existence and  
 ' continuance of the foresaid trust, and of the sums expended,  
 ' or to be expended, in payment of debts,' &c. ; ' and in gene-  
 ' ral to all the burdens to which the said subjects may be ex-  
 ' posed; and in the event of the said Wedderburn Dundas  
 ' refusing to collate as aforesaid, he ought and should be pro-  
 ' hibited and interdicted from interfering with or molesting  
 ' the pursuers in the management of the other estates, lands,  
 ' heritages, debts, funds, and effects conveyed to them by the  
 ' foresaid trust-disposition and settlement.' In defence the  
 appellant contended that he was not bound to collate, and was,  
 notwithstanding, entitled to an equal share of the fund over  
 and above the English property. The Lord Ordinary reported  
 the question to the Court on Cases, and issued the subjoined  
 note of his opinion.\*

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\* ' On the merits of the case, the Lord Ordinary has not a doubt; and considers  
 ' that the last case decided by the Court in circumstances not similar to this, but re-  
 ' quiring the application of the principles of law recognised in questions of this sort,  
 ' places this case in a very clear point of view. The Lord Ordinary alludes to  
 ' Trotter v. Trotter, 5th December 1826, quoted by Wedderburn Dundas. In that  
 ' case, it was admitted, on all hands, both by English and Scotch lawyers, that the  
 ' law of approbate and reprobate in Scotland, and the law of election in England,  
 ' are to the same effect, and that they both apply wherever it is clear that a testator  
 ' has intended to bequeath or convey a subject, but has failed to do so in a legal  
 ' technical manner. If, in such case, the person to whom that subject belongs or  
 ' falls, through the failure of the proper technical conveyance, and which he would  
 ' not have got if the deed had been technically formal, has also a separate interest in  
 ' the deed; and, while he claims that separate interest, claims also the subject con-  
 ' veyed away from him informally, he will not be permitted to take both. In Scot-  
 ' land, the law of approbate and reprobate applies: in England, that of election.  
 ' Both go to this, that the person may make his election, and take one, viz. either  
 ' take the share arising out of the deed, if the testator's whole intentions have effect,  
 ' or the subject not technically conveyed; but not both.

' Now, in this case, there is no question that the law of Scotland is the rule of  
 ' guidance. The late General Dundas was a native of Scotland, and domiciled in it,  
 ' and left a deed executed in the Scotch form. There is no room for questioning his  
 ' intentions with regard to the property called Sanson Seal, situated within the Ber-  
 ' wick bounds. It is conveyed by specific description to his trustees, along with all  
 ' the rest of the landed property situated in Scotland. It may be true, and is ad-  
 ' mitted to be so, that, owing to the deed not having been executed in the form  
 ' required by the English statute of frauds, it is not in form to carry the Sanson  
 ' Seal to the trustees, and that Mr Wedderburn Dundas is entitled to claim it. But

Dec. 22, 1880. On advising the cases the Court, on the 14th of January, 1889, found, ' That if Wedderburn Dundas (the appellant) ' shall ultimately take the estate situated in England without ' surrendering the same to the purposes of the trust, he cannot ' be entitled to claim under the trust-deed any share of the ' heritable and moveable estates in Scotland thereby conveyed ' to the trustees.'\*

**Wedderburn Dundas appealed:**

*Appellant.*—It is admitted both by the respondents and in the judgment complained of, that there has been no legal conveyance of the English property, and that the appellant has the exclusive right to it. But it is said that he cannot take benefit under the first deed unless he shall collate the English property. To make out this proposition it is maintained, that although the deed be impeachable to the effect of transferring the estate, it is probative to the effect of establishing that it was the intention of the testator to convey the property to the trustees, and that the appellant cannot, in the face of that declared intention, take the English property exclusively, and also claim in virtue of the trust-deed. But the true view of the case is, that the deed being impeachable as to the alleged act of transfer, it must be read as if that property had not been mentioned in it; and, in that case, it is not disputed that the appellant would have been entitled to a share of the trust funds without collation, as was decided in *Trotter v. Trotter*. It is said, however, that this case must be decided by the law of Scotland; and this gives rise to these questions, 1st. Whether it is to be governed by the law of that country or of England; and, 2d. Whether there be legitimate evidence of the alleged intention; and, 3d. Whether the taking of a foreign property can bar a party from claiming under a Scotch deed.

In regard to the two first of these propositions, it is clear that as the question relates to an English estate, and to the probative nature of a deed of conveyance under the law of England, it must be judged of by that law. It was so held in the cases of

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\* there being no doubt that his father did not intend that he should have that subject and a share of all the others, the law of approbate and reprobate applies, whereby he must make his choice either to abide by the Sanson Seal, or let it be sold by the trustees, and take his share of the whole estate, real and personal, left by his father.'

\* 5 Ch.—and Dunlop, p. 241.

*Robertson v. M'Vean*, and *Ross v. Agliaby*. Again, with Dec. 22, 1820, reference to the last proposition, the appellant offered to show, that, according to the law of England, there is no such case of election raised as to prevent him from availing himself of his rights as heir-at-law, and also taking benefit under the deed.

But supposing that the question were to be decided by the law of Scotland, there is no legal evidence of the intention to convey. It is admitted that there is no such evidence of the actual conveyance, and it is somewhat incongruous to maintain, that while there is no such evidence there is legal proof of the will of the testator to convey. Assuming, however, that there were such evidence, the circumstance of taking an English estate does not bar a party from claiming benefit under a Scottish deed, even where the intention to convey has been clear. This was so decided by this House in the above case of *Ross*, and in those of *Gibson*, *Dundas*, and *Henderson*, and the rule was recognised in *Crawford v. Coutts*.

The authorities on the part of the respondents are inapplicable to a case of this nature. In the cases of *Kinloch*, and of *Drummond*, the question related not to one of succession, but to the right of a creditor to proceed against the heir of his debtor. In that of *Robertson v. M'Vean* a party claimed the benefit of the Scottish right of collation in regard to heritage in Scotland, but declined to collate Jamaica property, and being thus in the position of demanding a benefit of a peculiar nature under that law, he was met by the equitable plea that he was not entitled to it unless he gave equal benefit under that law. But in the present case the appellant does not ask any peculiar benefit conferred by the law of Scotland. He founds on the express terms of a deed conferring upon him a share of the funds. In the cases of *Cunningham* and *Kerr*, the deeds were not null, but only reduceable on extrinsic objections peculiar to the law of Scotland.

*Respondents.*—The construction of a deed must be regulated by the law of the country in which it was executed—a rule established by the cases of *M'Harg*, *Murray*, and *Trotter*. The deed in question was executed in Scotland by a native domiciled Scotchman; and although ineffectual, according to the terms of a foreign law, to transfer a foreign property, yet being probative by the law of Scotland, it affords legal evidence of its contents, and consequently of the intention of the testator—a rule established by the cases of *Cunningham* and *Kerr*. The question therefore is, whether a party is entitled to take benefit



Dec. 22, 1830. under a deed, and at the same time to defeat the avowed intention of the maker. The negative of that proposition has been settled by the cases of *Kinloch, Drummond, Balfour, Robertson v. M'Vean*, and *Robertson v. Robertson*. In all of these it was held that the Scottish rule of approbate and reprobate was applicable; and therefore, that if a foreign property was included in a Scottish deed, but was, from defect of form, not effectually conveyed, the party availing himself of this defect, could not also take benefit under the deed. The decision of this House in the case of *Ross* was not intended to affect the general rule, but had reference to the construction of the statute 1681, cap. 10, it being held that that statute did not, in consequence of a conventional stipulation in a marriage contract relative to foreign property, bar a widow of her legal rights over property in Scotland.

In the course of the argument, the

LORD CHANCELLOR asked—Do not the English Courts take upon themselves to dispose, in a sense, of English land where the will is attested by fewer than three witnesses? Suppose I have an estate of Blackacre, worth £50,000, and I have also money in the funds, or other personalty, to the amount of £50,000, and I give and devise, by a will so insufficiently attested, my estate of Blackacre to B, and I give my money in the funds to A, my heir-at-law, upon condition that he shall take none of my real estate; B cannot read the will in an action of ejectment to entitle him to recover possession of Blackacre, as devisee; but A, coming to the Court of Equity for his legacy, must take it under a condition of giving up the estate of Blackacre to B; it is not just that, because the will touching Blackacre is good for nothing, and cannot be used by B, therefore the heir-at-law should deal with the will so as to take the legacy under it, and the land in spite of it. The answer to him is, "Take your choice,—either give up Blackacre to B, or do not take the £50,000 that has been left you:" and in this way the will operates on land. Now, does the Scotch decree affect the English estate here, any more than the English decree would affect an English estate in the case put? It is an express condition.

After the argument:

LORD CHANCELLOR.—In this case, my Lords, I shall state what occurs to me as the proper advice to give your Lordships with respect to the decision you should pronounce, and I should do so now, having certainly a strong opinion upon the subject. But as there is said to be the appearance of a clashing between the decision of the Court of Session and something that fell from a Noble and Learned Lord, who formerly presided in this House, and who advised your Lordships in the cases of *Coutts and Crawford* and *Ker v. Wauchope*; and as it is very much to be wished that there should not be the slightest discrepancy

between what has passed before and now on the law of Scotland, in a Dec. 22, 1830. matter of such importance, I shall postpone the further consideration of the present question, until I have had an opportunity of looking into these cases again; and if I should be of opinion that there is any thing of difference between the decision of the Court of Session now, and the decision which your Lordships came to on the former occasions, I shall take an opportunity of talking with the Noble and Learned Lord who proposed the judgment of the House in those cases.

On this point the English law is settled, but not perhaps upon the most natural and obvious principle; for undoubtedly, not only in the case of *Barry v. Boodie*, but in several other cases, and particularly in the case of *Ker v. Wauchope*, in which my Lord Eldon felt a good deal on the subject of the principle laid down by Lord Hardwicke in *Herle v. Greenbank*, that principle has not been deemed so substantially founded on what may be called natural reason and plain common sense, as to make it considered the principle which should have been adopted had the question been new. It was not so regarded by Lord Eldon, who seemed to think that there was a very substantial and shadowy distinction involved in it. But this distinction has been taken in the case of *Boughton*; and in the case of *Caney v. Askew*, (a correct note of which was taken by Sir Samuel Remilly, and confirmed by the recollection of Lord Eldon, who referred to a note of his own, which he said he found fully confirmed the accuracy of Sir Samuel Remilly's note.\*) That decision was pronounced by a most eminent Judge, Lord Kenyon;—and there the distinction was followed as in the case of *Herle v. Greenbank*, and never since deviated from. It is laid down by Lord Kenyon, that where there is an unattested will, you are not at liberty to look into a devise, which, being ill executed, under the statute of frauds, is void and infectual to disinherit the heir—for the purpose of putting him to his election; yet, where there is a condition with respect to the real property, affecting the real property—and there is annexed a bequest of personalty to the heir, whether you call it the doctrine of election or not, does not signify—you are entitled to make an exception to the rule, that an unattested will does not put the heir to his election. If you make that exception, you let in the condition which touches the realty. You let in that condition for the purpose of forfeiting the personalty by the legatee, to whom both were given, unless, with that condition affecting the realty, he chooses to comply. So that you may really say, it is the doctrine of election with an express condition—the doctrine of election, in the more ordinary sense of the word, referring to an implied, not an express condition. With this distinction Lord Kenyon professes himself not to be well satisfied; but finding it to be the law, he felt himself bound, as we are bound, to administer it. Now, there does not appear in this case any thing affecting the doctrine of the English law in any judgment

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\* 1st Cox's Reports, p. 241.

Dec. 22, 1830. which this House may be advised to pronounce. The question which arises much more resembles that in *Barry v. Brodie*, than in *Carey v. Askew*; and I only introduce what I have said, with respect to the case of *Carey v. Askew*, in order to meet the argument of the learned Attorney-General, who contended that the argument he was opposing led to what certainly would be a monstrous proposition—that the Scotch Courts would by their decision set aside the statute of frauds, in respect of the important branch of the execution of a will touching real property in England. If this decision should stand, it will not by any means tend to show that the Court of Session has a right to set aside in any manner the statute of frauds as to a will, with respect to an English freehold estate. In the case of an heir-at-law by the law of England, under a will not executed according to the statute of frauds, it will not tend to show that the Scotch Courts have, any more than the Court of Chancery here, such a power. In the case put by Lord Kenyon in *Carey v. Askew*, of a condition affecting realty, and annexed to a bequest of personalty, that bequest giving to the heir as legatee, but requiring him either to give up the legacy, or to give up his right to the real estate, although the will, being unattested by three witnesses, cannot touch the real estate, and cannot even be read in an action of ejectment to oust the heir of possession, yet, substantially, it may be said to produce a similar effect:—for we say to the heir, “You have a right to this land—this will cannot take it from you—no devisee can maintain an ejectment on this will—he cannot even read it in a Court of justice; nevertheless, we are dealing with a personal legacy, not with a real devise. We say, take your choice; if you choose to insist upon your right as heir-at-law, and take the land, then you cannot have the money.” That is all the Court of Chancery would do in this case, and which the Court of Chancery did do in the case of *Barry v. Brodie*, and other cases. It appears to me at present, that the Court of Session have done nothing more to affect the real estate within the liberties of Berwick, than the Court of Chancery would do in the case I have put. They have only said, You come to us, not for the real estate, not to decide on the real estate in England, which we have no power to do; but you come to us as a legatee—you want to enjoy your fourth share under the will of the personal funds, and the heritable funds in Scotland; we have jurisdiction over them, and we put you to your election—either take the whole, according to the principles of the Scotch law—or reject the whole—take the legacy cum onere, or reject both the burden and the legacy. That is all the Court of Session has done. In the case of *Carey v. Askew*, the proposition refers to an express condition. The Scotch law, upon the doctrine of approbate and reprobate, does not appear to be the same. But the decision does not infringe on the English law; it operates only on Scotch personalty and Scotch realty, over which the Scotch Courts have an undoubted right; and they say; “We, according to your principle, take the whole of this deed together. We do not say the deed has any effect on landed estates, any more than Lord Kenyon said, in the case alluded to, that

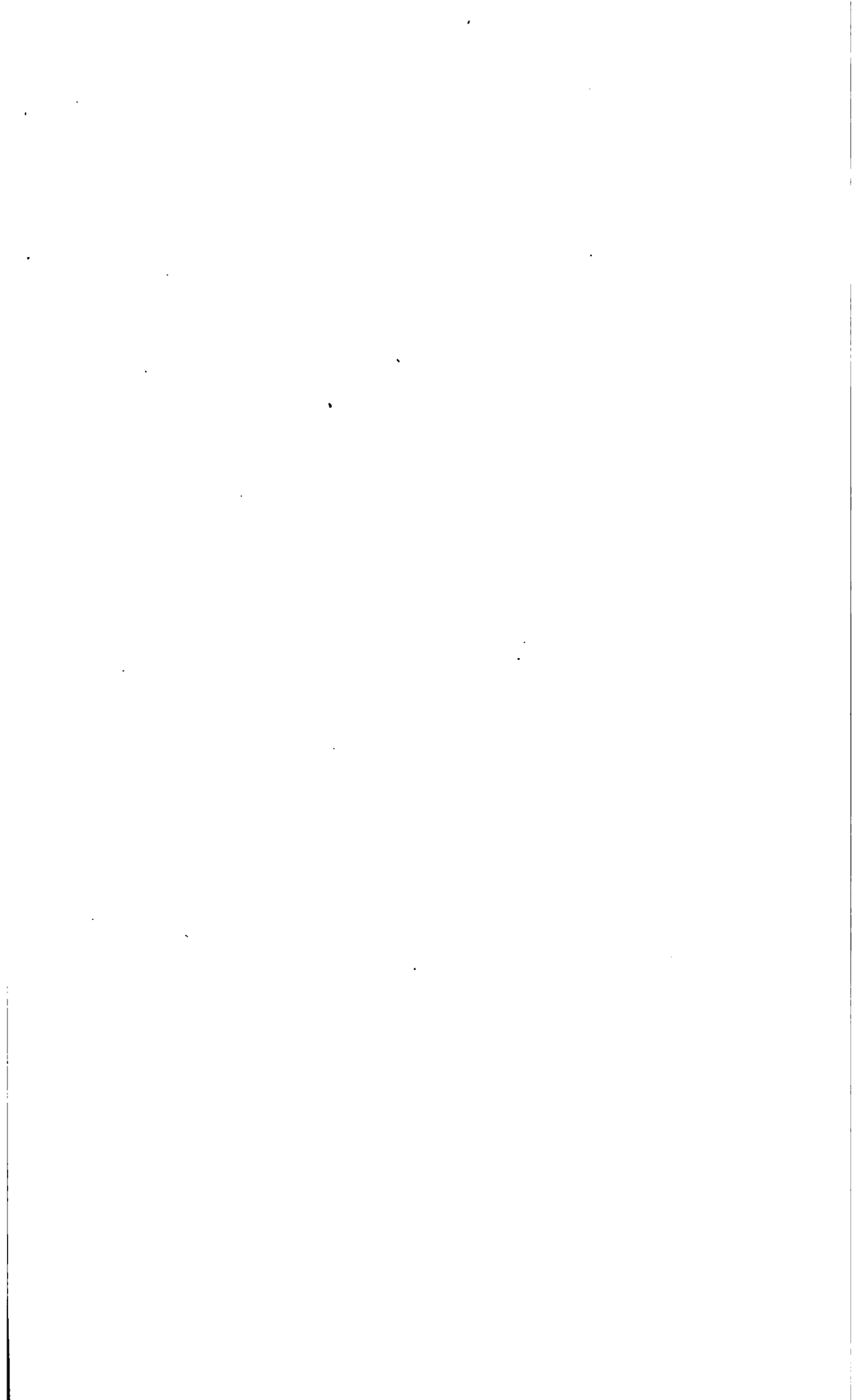
the will would affect an English estate. We do not say that this would take, in an English Court, from the heir-at-law his landed estates; but we are called upon to construe, according to the principles of our law, this Scotch deed; and knowing it to be a Scotch deed, we say, by the principles of Scotch law, not that you shall not have your estate in England, but that you shall not have your Scotch share, unless you will bind yourself to fulfill what we call, and construe to be the plain intent of the party."—It is taking up the matter upon the condition; the personal and real estate in Scotland the Court of Session can deal with, but not the English landed estate, except so far as the Court makes the vesting of the Scotch real and personal estate, or the share of it, to depend upon the voluntary act of relinquishing the English right. Now, as I am not prepared to say that the Scotch Court has not that power, and as I am prepared to say that they can exercise that power without violating the English law upon the ground stated, I should incline humbly to advise your Lordships to affirm the judgment. Nevertheless, wishing, if I can, to reconcile the affirmance of that judgment with the authority in those two cases of *Ker v. Wauchope*, and *Countess v. Crawford*, I shall look into them before I finally dispose of this case; and if I should still entertain a doubt, which would go to shake the opinion which I have now formed, then I should ask leave to consult the noble and learned person who advised on those cases, with respect to any discrepancy which may seem to exist. I will now only move your Lordships that the further consideration of this case be postponed.

Thereafter, on the motion of the Lord Chancellor, the House of Lords ordered and adjudged that the interlocutors complained of be affirmed.

*Appellant's Authorities.*—Robertson, Feb. 18, 1817, (F.C.) Ross, June 20, 1797, (4631). Crawford, (2 Bligh, 655). Trotter, Dec. 5, 1826, (5 S. and D. 78). Earl of Dalkeith, Feb. 1729, (4464). Dundas, Feb. 25, 1783, (15,585); reversed, May 21, 1783. Henderson, Jan. 31, 1797, (15,444); reversed, May 20, 1802.

*Respondent's Authorities.*—M'Harg, July 22, 1760, (4611). Cunningham, Jan. 17, 1758, (617). Kinloch, July 12, 1739, (4456). Drummond, June 7, 1798, (4478). Balfour, March 11, 1793, (2379). Robertson, Feb. 18, 1817, (F.C.) Robertson, Feb. 16, 1817, (F.C.). Trotter, Dec. 5, 1826, and June 10, 1829, (ante, III. 427). Kerr, May 3, 1819, (1 Bligh, 1.)

A. MUNDELL—RICHARDSON and CONNELL—Solicitors.



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1. The first part of the paper discusses the importance of the study of the history of the English language. It is argued that the study of the history of the English language is essential for a full understanding of the language and its development. The paper then goes on to discuss the various factors which have influenced the development of the English language, such as the influence of other languages, the influence of social and cultural changes, and the influence of technological advances.

2. The second part of the paper discusses the importance of the study of the history of the English language. It is argued that the study of the history of the English language is essential for a full understanding of the language and its development. The paper then goes on to discuss the various factors which have influenced the development of the English language, such as the influence of other languages, the influence of social and cultural changes, and the influence of technological advances.

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## APPENDIX.

### No. I.

OPINIONS of the JUDGES of the COURT OF SESSION, in  
STEWART v. FULLARTON, p. 196.

LORDS JUSTICE-CLERK, GLENLEE, ROBERTSON, PITMILLY, MEADOWBANK, MACKENZIE, and MEDWYN, delivered this opinion :— Frederick Campbell Stewart succeeded to the estate of Ascog in virtue of an entail. The irritant and resolute clauses, while they apply to the other prohibitions, being silent as to the prohibition against selling and annailzieing, he raised a declarator to have it found and declared, that he ‘ has full and undoubted right and power to ‘ sell and alienate the several lands, mills, teinds, fishings, and other ‘ subjects’ contained in the deed of entail ; ‘ and further, that it should ‘ be found and declared, that upon selling or alienating the whole, &c. ‘ for a fair price or onerous consideration, the pursuer has the sole ‘ and exclusive right to the price or prices or considerations thereof ; ‘ that the same are the pursuer’s absolute property, and that he has ‘ full power to use and dispose of the same at his pleasure ; and that ‘ the pursuer does not lie under any obligation to invest, employ, or ‘ lay out the same, or any part thereof, in the purchase or on the ‘ security of any other estate,’ &c.

A sale having been made of a portion of the estate, the purchaser also presented a suspension, for the purpose of trying the right of the seller.

As the question is one of some difficulty and of great importance, we consider it proper, not merely to give our opinion, but to detail the grounds on which it rests.

I.—As to the suspension.

The Act 1685, c. 22., having been passed for the purpose of regulating every question between third parties, whether purchasers or creditors, contracting with heirs of entail, as the provisions of the Act have not been complied with so far as regards sale and alienation, to which the irritant and resolute clauses are not applicable, we can have no doubt that the sale is good, so far as regards the purchaser, and that his suspension should be refused.

II.—As to the declarator at the instance of the heir.

We are of opinion, that the Act 1685 is the code by which the rights of third parties are regulated. But we hold, that what was the common law of Scotland before that statute was passed, regulates questions among heirs, and that entails, containing only a simple destination or a prohibitory clause, are still effectual inter hæredes, according to their nature.

It need scarcely be observed on this point, that if a simple destination in a tailzie remain unaltered it will regulate the succession, and the heir of provision will succeed to the prejudice of the heir of line. But it is more material to attend to the operation of a tailzie with prohibitory clauses, merely in questions among heirs.



We are of opinion,—1. That the substitutes under an entail with prohibitory clauses have a *jus crediti*, which cannot be defeated by any gratuitous deed. 'The obligation upon them not to alien or contract debt, when it is not strengthened by irritant and resolute clauses, is only personal against them and their heirs, but does not affect creditors or purchasers;' Erskine, b. iii. tit. 8. § 23. Or, to quote from the Annotations on Stair, p. 110. (which is evidently the work of an acute and intelligent lawyer), 'It is clear that if there be no irritant and resolute clauses in the charters and sasines, this clause,' (the case put is a prohibitory clause against altering the succession or contracting debt), 'even though repeated in these writs, is no more than a personal obligation, and will not affect singular successors for onerous causes, and that especially now since the Act 1685, whereby none of these tailzies are effectual against singular successors, except such as contain irritant and resolute clauses.'

Hence, if an entailer prohibit his heirs from contracting debt, or from selling the estate, and if the heir take the estate under that provision, and notwithstanding contracts debt or disposes, the creditor or disponee is safe, because the heir was *fiar* of the property, and the provisions of the Act 1685, so as to affect third parties, have not been complied with; but if the heir attempt to defeat the prohibition by any gratuitous act, the substitute heir under his *jus crediti* may set such gratuitous deed aside.

It was held, immediately after the Act 1685 passed, (so little was it then considered that an heir of entail has no other remedy but in virtue of that Act), that a clause prohibiting the disponee and substitutes from doing any deed which might affect succeeding heirs, was a sufficient ground for the next heir, or one who on a bond had adjudged from him, 'to reduce, on the Act 1621, any posterior gratuitous or voluntary deeds not depending on prior onerous causes, though it wanted a clause irritant, for that would resolve, irritate, annul, and reduce even onerous creditors' debts;' Earl of Callender, 27th January 1687, Fount. This right in the substitute is universally recognized: Mackenzie, vol. ii. p. 325. and 487. edit. 1722; Stair, b. ii. tit. 3. sect. 59. in fine; Bankton, b. ii. tit. 3. sect. 139.; Ersk. b. iii. tit. 8. sect. 23.; Craik v. Craik, 29th January 1735. This was indeed admitted in the pleadings by the pursuer's Counsel, and it appears to be beyond question.

2. To make an entail effectual against third parties, it must be recorded in the Register of Tailzies; yet an heir of entail cannot found upon the omission of that solemnity as a defence in any action for contravention at the instance of a substitute. He is bound by the limitations in the right by which alone he holds the estate, and an heir-substitute has a *jus crediti* entitling him to enforce the obligation, although that provision of the statute has not been complied with. This point seems first to have occurred in the case of *Leslie v. Dick of Grange*, 15th December 1710, Fount.; but there was no room for deciding it there. It was, however, decided in *Willison v. Callender of Dorrator*, 26th February 1724, Kames; also in *Hall v. Cassie*, 17th February 1726, in which it was found that 'tailzies are good against heirs without registration, but not against creditors.' In a question with a widow the same has been found, that irritant and resolute clauses, and consequently registration, are unnecessary to make entails effectual *intra familiam* of the substitutes; *Gibson v. Ker of Hoselaw*, 24th November 1795, also reported in *Bell's Cases*, 5th

June 1795; *Makgill v. Makgill*, 18th June 1796; *Duchess of Roxburghe v. the Duke*, 11th January 1820.

3. To make an entail effectual against third parties, it must be recorded; but any substitute heir may apply to the Court of Session to compel the heir of entail to produce the deed, in order that it may be recorded. This arises from the *jus crediti* which the substitute has under the entail, although at the same time it is ineffectual, while not recorded, against creditors or purchasers: *Ersk. b. iii. tit. 8. sect. 26, 27.*; *Nairne v. Sir T. Nairne*, 10th March 1757; *Ker v. Duke of Roxburghe*, 7th July 1804.

4. Where an heir, besides being heir of entail, is also heir of line, the substitute heirs of entail have a *jus crediti* to entitle them, and have an interest to pursue measures for compelling the heir in possession to expedite charter and sasine upon the entail, and to possess under those deeds; and if they neglect to use this *jus crediti*, they will be excluded by prescription: *Macdougall v. Macdougall*, 10th July 1739; *Maule v. Lord Dalhousie*, 1st March 1782. But it is obvious that the provisions of the Act 1685 not having been yet complied with, the tailzie is ineffectual under that Act, so far as third parties are concerned.

What we have now stated being points of settled law, we are of opinion that they afford conclusive evidence that an entail, though not completed under the statute 1685, is nevertheless effectual inter hæredes; and if so, it is impossible to assign any reason why an entail with a clause prohibitory should not be effectual inter hæredes, since it is only with a view to third parties that clauses irritant and resolute were invented, or ever were supposed to be necessary. And again, if an entail with clauses prohibitory be effectual at all inter hæredes, and not absolutely null, or operative only as a simple destination, it can operate in no other way than by producing an obligation and *jus crediti*. No other mode or principle of operation has ever been assigned; and, in the present case, the existence of obligation arising from the prohibition was distinctly admitted by the Counsel for the pursuers—it was a point, indeed, which they could not dispute, although they endeavoured to limit that obligation so as to give it no higher effect than a simple destination, and therefore to render it not availing against the pursuer's pretensions.

It is true, that when an estate is held under an entail with a prohibitory clause only, or when, from any other cause, the entail has not the protection of the Act 1685, although the *jus crediti* of the substitute heir will enable him to defeat any gratuitous deed to the prejudice of the tailzie, yet as the heirs of entail in possession continue fiars, if they grant deeds for onerous considerations, these will be effectual to third parties contracting with them; for the obligation against the heirs not to alienate or contract debt is merely personal, and cannot affect creditors or purchasers, whose rights can only be affected by an entail under the Act 1685. Thence arises the question, whether, in the case of contravention by an onerous deed, the substitute has any claim against the heir contravening?

We are of opinion, that the *jus crediti* in the substitute heirs, which, as to gratuitous deeds, entitles them to set such deeds aside, gives a claim against the heir or his representatives to have the price reinvested, if the entailed estate has been sold contrary to the prohibition of the maker of the entail; or to have it disencumbered of debts, if such have been contracted contrary to a prohibition, and it has been burdened with them.

We find traces of this from as early a period of our law as could have been looked for, as it does not appear that an entail with a prohibitory clause was much known till about the beginning of the 17th century; and the temptation to defeat the provision, and the interest to resist it, would probably not emerge for some time, and would arise only on the existence of an heir of line not being an heir-male, in whose favour the tailzie was altered; or in the case of a contraction of debt, where the heir of entail did not also represent the predecessor in any other character.

In the report of the case of *Drummond v. Drummond*, 3d February 1674, by Gosford, this statement of the law is made:—‘That albeit in tailzies, where there is no clause irritant, the acquirers for a just and adequate right cannot be quarrelled; yet there being an obligation in the tailzie, that it shall not be lawful to any of the heirs who succeed to annailzie and dispone in prejudice of the next person who is substitute in the tailzie, the same furnishes an action against the first disponer for damage and interest, and the person substitute or his heirs who are prejudged, albeit they cannot succeed to the land, yet they will have a personal action *super pacto de non alienando* against the disponer and his heirs, as is clear by Hope in his *Compend.* where he treats of the nature of the tailzies of land.’

The point, however, did not occur for decision in that case, and Gosford accordingly remarks, that the point was not decided.

The annotator on Stair, who wrote prior to the year 1725, observes, p. 114. ‘The next case therefore may be—If tailzies contain provisions that the heirs shall not sell nor dispone any of the lands, nor contract debts, nor do deeds whereby the tailzie may be frustrate or irritant, and that all such deeds shall be null and void, but contain no irritant clause of the contravener’s right in case these debts are contracted;—there seems no question in that case, that the clause not to alter or contract debts would be valid and effectual against the contravener and his other heirs, to subject them to the reparation of the heir of tailzie’s damages by the contravention, not only from what has already been said, but likewise from the Act 1685, whereby a person may substitute heirs to himself with what conditions and provisions he pleases.’ In the case supposed it need scarcely be remarked, that the insertion of an irritant clause, which could not be effectual against the creditor, makes no difference as to the heir, and could not strengthen the effect of the prohibition.

The point was first in terminis decided in the case of *Lord Strathnaver v. the Duke of Douglas*, 2d February 1728, where there was a simple prohibition against contracting debt. An heir having contracted debt, his representatives were found liable to disburden the entailed estate, on the ground that he was bound to fulfil the conditions imposed on the grant, and under which he had accepted the gift.

Although the judgment in this case contains a finding on another point of law which has not been followed in subsequent cases, the point at present under consideration is not connected with that finding, and it, on the contrary, has been confirmed. Accordingly, when the question again occurred in the case of *Cumming Gordon of Pitlurg*, 29th July 1761, the principle established in the case of *Strathnaver* was adhered to. There the pursuer brought an action having two conclusions;—for declaring that he had power to sell the estate,

and that he should be at liberty to dispose of the price at his pleasure : and his argument was founded on this, that there were no words in the prohibitory clause expressly prohibiting sales, and that it was only from construction that such prohibition was inferred. There was no irritant clause in that entail.

The interlocutor of the Lord Ordinary, Alesmore, 1st July 1761, applies strictly to both conclusions of the declarator. Mr Miller, afterwards Lord President, who wrote the reclaiming petition against this interlocutor, after laying it down that there is no express prohibition, argues, 1<sup>st</sup>, That the clause does not imply a constructive prohibition against sale ; and, 2<sup>d</sup>, That if it did, such would not be sufficient to supply the want of express words. He concludes his argument in the words which were read by the Counsel for the defender, in which this eminent lawyer did not venture to dispute the conclusion, that if there was a prohibition, the heir of entail on contravention was liable in reparation to the substitutes.

This decision was followed by the case of *Sutherland v. Sinclairs and Baillie*, 26th February 1801. The entail in that case contained a prohibition against contracting debt, and an irritancy of the heir's right on contravention, but no irritancy of the debts. Here it is plain, that a resolute clause alone could not make the prohibitory clause stronger than it would have been without it. Debts were contracted by the heir in possession, and the entailed estate was adjudged and sold by the creditors. The next heir, stating it 'as a clear point, that an heir of entail has a claim against the representatives, or separate estate of preceding heirs, for relief of the damage he has sustained through the entailed estate being either totally evicted or improperly burdened,' brought an action to have it found, that he was a creditor to the extent of the price at which the estate was sold, and that the executors of the heir should be liable for the amount. This was found accordingly. The reclaiming petition argues the case fully, but no attempt is made to dispute the conclusion that reparation is due, if a prohibition has been contravened ; and the bent of the argument is to show that the prohibition is not applicable, or that the heir is not in a condition to found upon it.

These cases show pretty clearly that the law was held to be fixed, more especially as no contrary one can be cited ; and we have reason to believe, that opinions by the most eminent Counsel at the bar were given in conformity therewith, and that the same has been publicly taught and understood as law in Scotland. It is held by the late Lord Meadowbank, in 1815, as a fixed point, in the opinion delivered by his Lordship in the case of the Earl of Wemyss.—*Fac. Coll.* p. 274.

The question again occurred in the case of *Sir James Stewart v. Lockharts*, 11th June 1811. It was held, that, under the prohibitory clause, the substitutes had a *jus crediti* which could not be defeated by any voluntary deed ; and that although a purchaser was safe, the heir in possession was bound to reinvest the price of the lands, although it might be afterwards carried off by onerous creditors ; and the report bears, that 'the majority held that the point was already fixed by the decisions.'

The same decision was also given in the case of the Earl of Breadalbane *v. Campbell of Monzie*, 12th June 1812.

The case of *Sir James Stewart*, having been carried by appeal to the House of Lords, was remitted in consequence of doubts enter-

tained of the soundness of the principles on which it had been decided ; and, although no proceedings have since taken place under that remit, these doubts have naturally called upon us, with the most minute attention, to consider the grounds which induced our predecessors to hold, that under an entail with a prohibitory clause merely, or where the provisions of the Act 1685 have not been followed out, a contravention of a prohibition, though effectual to a third party, may be made the foundation of a proceeding against the contravener himself, or his heir or representative.

On considering the objection stated to the view of the law taken by us, it appears,—

1. That the Act 1685 did not, and was not, meant to supersede every other form of entail, except the strict one which is effectual against third parties.

This we think established by the following considerations, arising out of the history of entails in this country.

The first form of entails was that which contained only a simple destination, and is the only form of entail noticed by Balfour, p. 174. It could be put an end to at pleasure by the joint will of the superior and vassal. The subsequent heirs had no more than a spes successionis.

Attempts were, at an early period, made to limit the power which the vassal had, in concurrence with the superior, to defeat the rights of the substitute heirs. This was first attempted by the fiar imposing personal obligations upon himself in favour of his heir. Of this, two remarkable instances are to be found—one noticed in the Acta Dom. Concilii, 17th October 1478, and the other in the Acta Dom. Audit. 7th June 1493.\* Such contracts are also noticed by Dirleton, pages 87. and 198. and instances of such are referred to in the cases of Sharp v. Sharp, 14th January 1631, and Ure v. Crawford, 17th July 1756.

2. Next it was attempted to limit all the subsequent heirs, by laying each in succession under such prohibitions as the entailer thought proper, as to altering the succession, selling, or contracting debt. Such clauses were introduced in the time of Craig ; but their validity had not been tried, and he seems to doubt their efficacy, in the case at least of a feu granted to heirs and assignees, L. ii. D. 5. sect. 7. But such doubts do not seem well founded. In the words of Lord Kames, ‘ It is plain that every single heir who accepts the succession is bound by the prohibition, so far as he can be bound by his own consent. His very acceptance of the deed, vouched by his serving heir and taking possession, subjects him to the prohibition ; for justice permits no man to take benefit by a deed without fulfilling the provisions and burdens imposed upon him in the deed.’—Law Tracts, p. 145. But although the prohibition bound the heir, and all those who contracted with the heir titulo lucrativo, so that gratuitous deeds were prevented, (against which also, as has been adverted to, the provisions of the Act 1621 have been found to be applicable), it was insufficient to affect those who contracted onerously with the heir ; so that, with a view to strengthen the effect of this clause by publishing it to the world, inhibition was used upon it, and by this it was attempted to make it effectual against third parties. But it was found

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\* Recently printed under authority of the Commissioners for printing the Parliamentary Records of Scotland.

'that there may be many ways by which this provision may be frustrated.'—Minor Practica, voce Tailzie, sect. 364. edit. 1726.

3. 'To prevent and remeid this, there is a new form found out,' says Sir Thomas Hope, who wrote about the year 1635, 'which has these two branches; viz. either to make the party contractor of the debt to incur the loss or tinsel of his right in favour of the next in tailzie, or to declare all deeds done in prejudice of the tailzie, by bond, contract, or comprising, to be null of the law.' Ibid. sect. 367. The object of these clauses was not to make the prohibitory clause binding upon the heirs, which was not then doubted, but to make it effectual against third parties; and their effect came first to be tried in the case of Stormont, 1662, when a tailzie with a resolute clause was held to be effectual against creditors; but the doubts entertained of that decision, and the desire to validate entails against purchasers and creditors, led to the Act 1685, c. 22., by which, if the conditions and provisions of an entail are affected by clauses irritant and resolute in the investiture, and published in the Register of Tailzies, they are declared 'to be real and effectual, not only against the contraveners and their heirs,' (about which there was not any dispute), 'but also against their creditors, comprisers, adjudgers, and other singular successors whatsoever, whether by legal or conventional titles.'

That the purpose of this Act was merely to make entails effectual against third parties, Sir George Mackenzie, who is generally supposed to have framed the statute, declares in positive terms; for after giving an account of the decision in the case of Stormont, he adds, 'To strengthen these clauses against singular successors, by making them more authoritative and better known, there was an Act of Parliament made anno 1685, whereby such clauses were declared valid against singular successors, providing they be set down,' &c. Mackenzie, vol. ii. p. 149. See also at p. 325. sect. 2, 3. And in like manner Lord Stair, who was Lord President of the Court at the time, says, 'By Act 22. of Parliament 1685, clauses irritant in tailzies are approved as effectual against creditors and singular successors, being once produced before the Lords and approved by them, and the original tailzie being registered in a separate register for that purpose, and being repeated in all the successive sasines.' Stair, b. ii. tit. 8. sect. 58.

If, from the date of the passing of this Act, it was the meaning of the Legislature that an entail was to be altogether ineffectual, even inter hæredes, unless all the requisites of that Act were complied with, Lord Stair could not have failed to have altered, in the edition of his Institutes published in 1698, what he had laid down on this subject in 1681, b. ii. tit. 3. sect. 59. Sir George Mackenzie, in like manner, would not have treated of entails in the way he has done, vol. ii. p. 325.; nor would Erskine, b. iii. tit. 8. sect. 22., have classed entails into three kinds, 'when considered with regard to their several degrees of force.' Moreover, this last author subsequently lays down the law thus:—'Entails may be in many cases effectual against the heir of the granter, or against the institute who accepts of it, which cannot operate against singular successors;' b. iii. tit. 8. sect. 27. Indeed it seems quite impossible to dispute the proposition, that obligations under an entail with a prohibitory clause are effectual against heirs, if it be admitted that it founds a reduction of a gratuitous deed of contravention under the Act 1621; and this point must be disputed, and the right to reduce disproved, before effect can be

denied in a question among heirs to an entail so constructed, on the ground that it has not been completed under such a form as will make it effectual also against singular successors.

Nay, in a question with creditors, it was at one time found by the Court of Session, 'that the prohibitory and irritant clauses in a personal right were not effectual against creditors when not recorded in the Register of Tailzies, on this ground, that the statute 1685 was a total settlement of the whole system of entails in such questions; but the House of Lords put a more limited construction on the statute, as only concerning tailzies upon which infestment had followed,' (Kilkerran, p. 546.), in the case of *Baillie v. Stewart Denham* in 1731; and this has been held as law ever since: Creditors of *Carleton*, 21st November 1753; *Chisholme*, 27th February 1800. So that, in one case at least, an entail will be effectual even against creditors without the aid of the statute.

II. We do not consider it as a proof that there is no obligation, no *jus crediti* under such a deed, because it has been held that inhibition cannot be used upon it.

For, 1. That there is a *jus crediti*, to a certain extent at least, is unquestionable, otherwise reduction on the Act 1681 would not be competent, for the title to pursue is the being a creditor of the person whose deed is to be set aside. As already noticed, this is admitted.

2. It has also been held, that inhibition cannot be used by the heir of a marriage to secure the provision contained in the contract of marriage; *Gordon v. Sutherland*, 3d January 1748. Neither can any interdict be obtained against a father selling the lands; *Cunningham*, 17th January 1804; and yet it cannot be disputed, that the heir of a marriage has such a *jus crediti* as will entitle him at the death of the father to the price of the lands settled on him by the contract, which, as far, the father has it in his power to sell; *Cunningham of Bowerhouses*, 20th December 1810; *Earl of Wemyss*, 28th February 1815.

We consider the use of inhibition, in order to enforce a prohibition against third parties, has been virtually superseded by the Act 1685, which declares that no tailzie shall be effectual against third parties except when completed and published in terms of that statute; and therefore, to attempt to enforce any such obligation against the heir in possession by inhibition is obviously inept, as it would in effect be constituting an entail against the person inhibited, as strictly as if the prohibitory clause had been fenced by irritant and resolutive clauses, and recorded in the Register of Tailzies. But although this cannot be done, it seems impossible from this to infer that no obligation arises from a prohibitory clause against the heir himself, because it cannot by using inhibition be made effectual against onerous creditors.

And upon the same view of the law we conceive was founded the refusal to grant an interdict against the heir, even when it did appear that he intended to violate the prohibition, which occurred in the case of *Sir James Stewart* already mentioned. At any rate it is certain, that that refusal could not have proceeded from an opinion that the prohibition did not constitute any obligation, since there the Court found that the heir was bound to reinvest the price.

III. Neither do we think, because the Act 1685 puts it in the power of an entailer to execute a strict entail, by which the prohibitory clause may be effectually fenced against third parties, that if he does not take the benefit of this Act, the legal effect, which, prior to

that Act at least, was consequent on the deed he has executed, is not now to follow. The heir under a simple destination will unquestionably succeed, if it be not altered; and an entail with a prohibitory clause will be effectual, unless where the subject of it has been disposed for an onerous consideration; and a gratuitous alteration will even be avoided. But the irritant and resolute clauses have no operative effect in themselves independent of the prohibitory clause, which is the limiting or restricting clause, while the object of the other clauses is only to make these limitations and restrictions upon the heir's right effectual against third parties. That the maker of an entail has not availed himself of his right to insert irritant and resolute clauses, is probably an unintentional omission on his part; but even supposing it otherwise, this only can be inferred from it, that he did not mean to prevent onerous transactions with third parties, leaving their effects, so far as heirs are concerned, entire. That he might have tied up his heirs more than he has done, is no reason why effect should not be given to the restrictions he has imposed.

IV. It is further objected, that the avowed object and intention of the entail in the present case was to secure the estate of Ascog to his heirs, and not to entail upon them a sum of money, or a separate estate purchased with the price of Ascog; that to reinvest the money is not fulfilling the intention of the entail, in terms of the deed out of which the obligation is said to arise; and that to infer such an obligation from the prohibition to sell, is violating the rules of strict construction which ought to be applied to entails as restraints upon property.

The doctrine of strict construction we fully admit; and from this it arises, that no fetters are to be imposed from implication or inference, or any clause which is usually made use of in creating a limitation supplied, although the omission be obviously through inadvertence, and by mistake. But when limitations, after applying the doctrine of strict interpretation, are found to exist, these limitations are to be construed according to the usual and legal import of the words, and according to the meaning affixed to them by the entail. Upon this ground were decided the case of the competition for the estate of Cumbernauld, 19th January 1804; the case of the Roxburgh feus, 11th January 1808; and the cases of the Queensberry, 21st February 1816—Turnerhall, 6th December 1811—and Stobbs' leases, 10th March 1814;—all of which, except the first, have also been decided in the Court of the last resort. Now it appears to us, that as the prohibition to sell in the present case is the declared will of the entail, although he has not fully and absolutely provided for specific implement by using the statutory means, whence it arises that onerous sales must be effectual, still we do not see why the legal consequence of contravening such a prohibition, according to the solemn determination of the Court, just two years before the present entail was made, which was in 1768, should not have effect. Hence, to make the heir reinvest the price, is not implying any condition or restriction not imposed by the deed; on the contrary, it is giving legal effect to the prohibition contained in the deed.

The same takes place on the breach of the obligation for settling the estate on the heir of a marriage: if it be sold by the father for an onerous consideration, the sale is good; but if any part of the price remain unspent at his death, the heir is entitled to it, although he by this does not get specific implement of the obligation, namely, the estate.



V. Even although it should be held, that an heir succeeding under an entail with all the clauses pointed out in the Act 1685, and duly recorded in terms of that Act, can do no more than irritate deeds in contravention of the entail, and has no claim for damages or reparation, (upon which we offer no opinion, as the case is not before us), it would not affect the present question. For if an entail with prohibitory clauses merely raises an obligation against the heir, although it be ineffectual against third parties, that the entailor might have imposed upon his heir a prohibition with a different mode of enforcing it, does not seem to us to alter or impair the right which arises out of the prohibition as it stands. Besides, the refusal of damages for an attempt to alienate, when the alienation is not effectual, but void as *ultra vires*, and the refusal to give redress for an alienation actually made and effectual, though done contrary to an obligation in favour of the heir, seem to rest on very different grounds; and hence the decision given by the House of Lords in the case of the Queensberry leases, 10th March 1824, does not affect the views we entertain. For the present question neither did nor could arise there; that being the case of an heir who, under the statute 1685, had set aside the deeds of contravention, and where what he claimed was damage suffered by himself individually, which, if due, was due solely to himself, and was not to be reinvested for the benefit of the subsequent heirs; and it arose, because, either from his delay in bringing the action, or from the necessary procedure for setting aside the deeds of contravention, damage beyond what the remedy under the statute would repair was said to have arisen to him individually.

We are therefore, upon the whole, of opinion, that while the sale must be effectual to the purchaser, because the prohibition to sell has not been guarded in terms of the Act 1685, yet, as the entailor declared that the heirs should 'not have any power or liberty to sell,' the pursuer has done what he had no right to do, (in the same manner as one who grants double rights does, yet the disponee last in date, if first infeft, will be secure), and must therefore be liable in reparation to the extent of the price obtained for the lands sold; and that the security for this price must be taken to the heirs of entail in succession, in terms of the entail of Ascog.

Lords PRESIDENT, HERMAND, CRAIGIE, and BALGRAY, concurred in the above opinion.

Lord CRINGLETIE delivered this opinion:—By the entail of Ascog and others, executed by John Stewart of Ascog, afterwards John Murray of Blackbarony, dated 28th May 1763, he conveyed to his heirs the lands of Longcoat, Borland, Milkingston, Windylaws, and others, in the shire of Peebles; and, with regard to selling, the deed contains this clause:—'Nor shall they have any power or liberty to sell, annailzie, or wadset the lands and others foresaid, or any part thereof, except allanarly such a part and portion of the same as shall be found necessary for relieving, paying, and satisfying the debts and obligations contracted and granted by me,' &c. This declaration of want of power to sell (for it is not a prohibition in direct words) is not protected by any sanction of an irritant and resolute clause applicable to it; so that the faculty of selling or not rests solely on this clause, that the heirs shall not have power to do so, whereas the other conditions and provisions of the entail are enforced by irritant and resolute clauses annulling the deeds done in contravention, and

forfeiting the right of the heir. Mr Murray, moreover, conveyed to his heirs of entail 'all and sundry lands, heritages, annualrents, tenements, or houses within burgh, tacks, steadings, rooms, possessions, and all other heritable subjects whatsoever, pertaining and belonging to me, in any manner of way, at my death, and all other heritable and moveable means and effects whatsoever, pertaining and belonging to me undisposed on at the time foresaid of my decease, and all bonds, bills, &c. This conveyance of the whole estate, other than the entailed lands, was under this condition—That the disponees 'are and shall be holden and obliged in the strictest manner, by their acceptance hereof, to convert the said heritable and moveable subjects, generally above disposed, into money, and to uplift the debts and sums of money above assigned; and, after payment of my proper debts and the legacies, if any be, to ware, employ, and bestow the free residue or remainder, &c. on purchasing of land in Scotland, and to take the rights and securities of the lands so to be purchased in the form of a strict entail, to the same series of heirs, and with and under the same conditions, provisions, burdens, reservations, restrictions, limitations, clauses irritant, and faculties, as are above set down with respect to my tailzied lands herein mentioned,' &c. Accordingly the lands of Drumsen and others were purchased and settled on the same series of heirs, under the same system of tailzie as those originally entailed by Mr Murray himself; so that the obligation imposed on the heirs has been fulfilled. But the lands being entailed in terms similar to those applicable to Ascog, they are equally liable to be sold.

The present heir, Mr Campbell Stewart, has sold the lands in Peebles-shire; and the question now at issue is, whether he is bound or not to re-employ the price of them in the purchase of other lands, to be entailed in the same terms as those contained in the original tailzie? The subsequent heirs plead that he is bound, while Mr Stewart says that he is entitled to dispose of the money as he thinks proper.

The ground on which the heirs proceed is, that the declaration of the want of power to sell, which I shall call a prohibition, constitutes a claim of damages or reparation against the heir who acts in contravention of the terms under which he holds the estate; and these damages are the value obtained for it, which becomes a surrogatum to be re-employed in the acquisition of other lands. This appears to me to be a total mistake, arising from converting the simple prohibition, or want of power to sell, into a declaration, that in case any of the heirs should sell, he should be obliged to lay out the price in purchasing other lands, which, in my apprehension, is contrary to all the rules which have hitherto been applied to the construction of tailzies, one of which, and the great and leading one, is, that no obligation is to be imposed on the right of property by implication. In a question at present before the Court, between the Duke of Gordon and John Innes, Esq. the opinions of the Judges of the Second Division on a different point are printed; and there it was distinctly laid down,—'That all presumptions drawn from implied intention are to be rejected; 2dly, That fetters are not to be raised on inferences, nor extended by analogy, from cases expressed to cases not expressed, however similar; and, lastly, That no effect is to be given to intention, unless expressed in clear terms.' The prohibition is therefore effectual to prevent a sale, or it can have no force at all. If one obligation can be inferred from a breach of it, why may not another? Why shall the construction not be, that the heir has forfeited alto-

ther?—that seeming to be the intention of the entail, in so far as relates to the contravention of the other conditions of his tailzie. It is admitted on all hands, that a simple prohibition to sell or annaizie does not form any obstacle to a sale to an onerous purchaser; but an idea has found its way into the minds of lawyers, that there is a distinction between the public and the heirs of entail, so that although the public may buy without committing a wrong, an heir is guilty of it by making the sale. With the greatest deference, this appears to me to be a radical mistake, proved to be so by the statute 1685, c. 23. itself. Such are considered to be the powers of a proprietor by the law of Scotland over his property, that his deeds must remain effectual against it as long as he continues to be the proprietor, and therefore, before any of his deeds regarding it can be set aside, there must both be a clause irritating or voiding the deed, and a resolute clause, whereby his own right must also be forfeited by having done that deed. Nor is there the smallest shade of difference between these deeds with respect to heirs and the public. It is indeed laid down by our authors, that a gratuitous alienation in contravention of a prohibition may be set aside on the Act 1621. I will not controvert this, although I think that it has arisen from old ideas of law entertained before the date of 1685, c. 23., continued down, without attending to the alteration introduced by that statute; and, *2dly*, That, in the cases to which the statute has been found to apply, the prohibition to sell was constituted in the form of an obligation on the heir of the estate not to do it, whereby the succeeding heirs were considered to be creditors of him in possession. But surely if this be true, or indeed whether or not, it is admitted on all hands, that this statute 1621 applies entirely to the protection of onerous creditors, for setting aside gratuitous alienations to their prejudice, and consequently does not apply to an alienation for onerous causes; and it leads to this great conclusion in this question—that there was no ground on common law for setting aside even a gratuitous alienation to the prejudice of creditors, when it required the intervention of the Act 1621 to operate that effect. Accordingly, it is not so much as insinuated by Mr Erskine, that there is any ground at common law for setting aside a gratuitous alienation, and far less for reducing a sale. On the contrary, he says that the heirs may burden the lands, or alienate them for onerous causes. He then alludes to the opinion of older authors, that inhibition might be used on entails, which he controverts, and adds, ‘For restraints are not to be multiplied by implication, and inhibition is ineffectual where the person inhibited is not laid under some prior obligation, which may be the foundation of the diligence.’ Here, then, is a passage certainly implying that a prohibition to alienate contains no restraint on the heir to sell, and constitutes no obligation of any sort against them. How, then, can there be any difference between heirs and the public? I cannot discover any, except in the case of a gratuitous alienation, which, it is said, may be set aside on the Act 1621. By common law, the consent of the superior was necessary to make an entail; and it is expressly laid down by Lord Stair, that, by the consent of the superior and vassal, an entail could be evacuated at pleasure. It is therefore no way probable, that, in passing the Act 1621, c. 18., the Legislature had the matter of tailzies in any way in their contemplation; and, in my humble opinion, any one who reads that statute must be satisfied that it had no such thing in view. I admit, however, that it has been applied to the reduction of gratuitous alienations in contravention of a prohibition to alienate, constituted in the form of an obligation not to

do so ; and allowing this to be sound law, which, with great deference, I doubt, there is no reason for extending to an onerous sale dubious principles applying only to a gratuitous alienation. The predicament in which the estate is placed by the latter is *toto cœlo* different from the former. The estate itself is rescued from the gratuitous donee, and the intention of the entailer is continued in execution. But by the sale his estate is carried off for ever to strangers, and all his views are defeated.

But I have shown, that, by our old common law, there is no difference with respect to the right of the public and that of the heirs of entail ; and that to set aside a gratuitous alienation, in contravention of a prohibition to sell, required the force of the statute 1621. But whatever were the old ideas of the power of entailers and the force of their tailzies, I imagine that it must be conceded by all, that these are and have been all regulated by the statute 1685, c. 22. That Act appears to me to proceed on this great principle, that it was possible to affect the public through the medium only of the heirs of tailzie, and consequently it was thought necessary to place both on the same footing, except in one single insulated case. It declares, that it shall be lawful to his Majesty's subjects to tailzie their land and estates, and to substitute heirs in their tailzies, with such provisions and conditions as they shall think fit, and to affect the said tailzies with irritant and resolute clauses, whereby it shall not be lawful to the heirs of tailzie to sell, annailzie, or dispone the said lands, or any part thereof, &c. ; declaring all such deeds to be in themselves null and void, and that the next heir of tailzie may, immediately upon contravention, pursue declarators, and serve himself heir, &c.

Now, it will be observed, that in this clause there is not the least notice of or reference to the public : It is directed exclusively to the heirs of entail ; and the mode is specifically prescribed how they are to be restrained. The entailer may impose what conditions he pleases on them, but he must add irritant and resolute clauses, whereby it shall not be lawful to the heirs to sell, &c. : and if he do not add these irritant and resolute clauses, surely the conclusion is, that it shall be lawful to sell, &c.

But the statute proceeds to declare, that such tailzies (*viz.* such as restrain the heir, for hitherto heirs only are mentioned) ' shall be allowed, in which the foresaid irritant and resolute clauses are insert in the procuratories of resignation, charters, precepts, and instruments of sasine, and the original tailzie once produced before the Lords of Session judicially, who are hereby ordained to interpose their authority thereto, and that a record be made in a particular register book, &c. ; and which provisions and irritant clauses shall be repeated in all the subsequent conveyances of the said tailzied estate to any of the heirs of tailzie.' Observe what follows :—' And being so insert, his Majesty, with advice and consent foresaid, declares the same to be real and effectual, not only against the contraveners and their heirs, but also against their creditors, comprisers, adjudgers, and other singular successors whatsoever.'

Here, then, it is expressly declared, 1<sup>st</sup>, That there must be irritant and resolute clauses to affect the heirs ; 2<sup>d</sup>, That these must be insert in all the conveyances and transmissions of the estate ; and, 3<sup>d</sup>, That the tailzie must be recorded in the Register of Tailzies ; all which is necessary to make it effectual against the heirs and the public. There is no distinction between the two, as is proved beyond dispute by the immediately following clause of the statute relative to heirs alone :—

‘It is always hereby declared, that if the said provisions and irritant clauses shall not be repeated in the rights and conveyances, whereby any of the heirs of tailzie shall brook or enjoy the tailzied estate, such omission shall import a contravention of the irritant and resolute clauses against the person and his heirs who shall omit to insert the same, whereby the said estate shall ipso facto fall, accresce, and be devolved to the next heir of tailzie, but shall not militate against creditors, and other singular successors, who shall happen to have contracted bona fide with the person who stood infest in the said estate, without the said irritant and resolute clauses in the body of his right.’ Here there is a distinction laid down between the heirs and the public in one single case, which, in my opinion, proves incontrovertibly that in other particulars the statute applied to both indiscriminately; and the consequence of this is plain, that if an entail do not choose to observe the mode pointed out to him by the statute, he has not taken the proper method to restrain the right of property in his heirs, who are therefore as free as is the public. To say that he has a right to prohibit his heirs to sell, and that if they do contravene that prohibition they are liable for damages, which are, to lay out the price on another estate, is just to repeal the statute, and to make an entail effectual against an heir, although there be no irritant and resolute clauses applicable to a sale,—to make it not lawful for the heir to sell, by the mere force of a prohibitory clause, when the statute enacts, that to make it not lawful the prohibition must be affected by irritant and resolute clauses. It is to enable the entailor to entail money, viz. the price, when he has not entailed the land. It appears to me, that the only possible ground on which a prohibition to sell can be converted into an obligation to re-employ the price obtained by a sale, is, that equity demands that the person who takes an estate under a prohibition to sell, ought not to be allowed to violate it with impunity. But I entirely concur with what was observed by the Lord Chancellor on the case of Westshiells, that there is no equity in restraints on the use of property; and I consider this observation to be proved by the statute 1685, which renders certain forms necessary, in order to restrain effectually heirs to estates from alienating them. If the Legislature had thought that there was any equity in enforcing restraints, they would have either not passed that Act, or declared that a prohibition to sell, or contract debt, or alienate, should be effectual both against the heirs and the public. But, as is already said, such an enactment was neither consonant to principles of law or the ideas of the Legislature. A case was put, at the pleading of this case, by the pursuer. It was supposed that an entail contained a prohibition to the heirs to sell or alienate the whole or any part, and also contained a resolute clause applicable to this prohibition, but no irritant clause: The heir was supposed to make a partial sale, which could not be set aside on account of there being no irritant clause; but, in consequence of the partial sale, the heir’s right to the remaining part unsold was forfeited; and it was contended, that he could not be called on to refund or re-employ the price of the part sold. This concession by the pursuer (viz. that the heir could be forfeited for contravention, in virtue of the resolute clause; when there was no irritant one) was laid hold of by the defender, who replied, that if the contravener could be forfeited for having made a partial sale, the same consequence would follow if he had sold the whole; but, as the subject could not be recalled from an onerous purchaser, the consequence must be, that the heir must be found liable for the whole price, because

otherwise this result would ensue, that the heir would be punished for a partial contravention, by forfeiting his right to the remaining part of the estate, whereas, if he sold the whole, he could not be liable in any way to the succeeding heirs. To solve this difficulty, I am of opinion that the concession was a mistake in law, viz. that the heir could be forfeited for the partial sale, while at same time it remained effectual.

The Act 1685 makes it necessary to have both an irritant and resolutive clause, in order to affect the heir, and make it not lawful for him to sell; and accordingly it has been decided in this Court, and in the House of Lords, that an irritant clause without a resolutive, and, per contra, a resolutive clause without an irritant, are each ineffectual to restrain an heir of tailzie from selling. This was argued by the Court in the case *Gardner v. Heirs of Entail of Dunipace*, reported by Lord Kilkerran, p. 540. No. 4. And I the more particularly refer to this case, because although, for want of an irritant clause, the debts were found to affect the estate, no use was made of the resolutive clause to forfeit the heir; nor does there appear on record a single instance, so far as I know, in which an heir has been forfeited in virtue of a resolutive clause, when the tailzie was defective in one irritating his deeds. In the case of *Dunipace*, Lord Kilkerran details the doubts and subtleties that had existed among lawyers relative to irritant and resolutive clauses. He says that no man ever doubted the necessity of a resolutive clause, 'while our lawyers were not agreed that an irritancy of the debt was necessary where the contravener's right was irritated.' Thus it was not agreed among lawyers, whether an irritant and resolutive clause were both necessary; and Lord Kilkerran continues,—'And though the statute has no retrospect, it has always been considered as settling the several subtleties about which lawyers had been so much divided, and particularly the import and effect of irritant and resolutive clauses,' &c. The statute then settled these subtleties; and it declares, that it shall be lawful to tailzie, with such conditions and provisions as the entailer shall think fit, 'and to affect the said tailzies with irritant and resolutive clauses, whereby it shall not be lawful to the heirs of tailzie to sell, annailzie, &c.; declaring all such deeds to be in themselves null and void, and that the next heir of tailzie may, immediately upon contravention, pursue declarators, and serve himself heir.' Both clauses are therefore necessary,—the one to set aside the deed of contravention, and the other the right of the contravener; for if the deed be not voided, the succeeding heir cannot pursue declarators, and serve himself heir. I therefore conclude, that if a tailzie do not contain an irritant clause, the resolutive will be inoperative, as much as an irritant clause is without the resolutive; and consequently no argument can bear on this cause which proceeds on a contrary supposition. In my humble opinion, an entailer who prohibits his heirs from selling, and who does not make that effectual by irritant and resolutive clauses, must be understood to say,—I prohibit you from selling, which is declaring my wish that you shall retain my estate; but if it so happen that you do not find it convenient to comply with my desire, I cannot help it; I do not choose to restrain you.

It is pleaded by the defenders, that the prohibition is only personal against the heir; but I apprehend this to be a mistake. The prohibition is entered in the infestment, and thereby must be a real burden on the heir, if it be validly constituted. But my opinion is, that it is neither real nor personal against the heir more than against the public, because it is not validly constituted by law. There are, therefore,

two mistakes ;—one in assuming that the prohibition is effectual against the heir, though not against the public ; and, 2dly, assuming that the contravention forms an obligation on the heir to make reparation. Nothing can more distinctly prove that a prohibition forms no personal obligation upon an heir than the fact now universally admitted, that an inhibition used against him has no effect whatever, although the contrary seems to have been understood in the days of Lord Stair, and even Lord Elchies. A very ingenious attempt was made by the Counsel for Mr Fullarton to show, that the reason why an inhibition is not competent on an entail is, that inhibition is only effectual to enforce or secure implement of an obligation to do or pay something ; whereas here there is only a prohibition to do. But this appears to me just to prove, that, even in a question inter hæredes, there is no obligation constituted by the prohibition. There is only one way appointed by the statute, whereby it shall not be lawful to the heirs of tailzie to sell ; and if that way be not adopted, the conclusion surely follows, that it remains lawful to them to sell : and if it be lawful, I cannot, by any process of reasoning of which I am capable, arrive at the conclusion, that they are under an obligation not to sell, and are liable for damages for doing what is lawful to be done ; whereas, if there were an obligation, it would secure the performance of it, and prevent the public from aiding to commit the breach. The mistake under which these old lawyers lay, with regard to the effects of an inhibition, accounts for their opinions on tailzies containing a prohibition to sell or alter, &c. They held the prohibition to be coverable by an inhibition ; but that being a mistake, it follows that the prohibition constitutes no obligation—it is just a prohibition, and nothing more ; and if not made effectual by irritant and resolute clauses, it has no effect whatever on heirs more than singular successors. It was said by the defender's Counsel, that an inhibition is not effectual in the case of an entail, because the estate is protected by a statutory immunity arising out of the Act 1685. But this is giving in other words the reason which I have already offered. For what is the immunity ? Nothing else than this,—that if an estate be not entailed in terms of the statute 1685, the entail cannot be propped by an inhibition. It is saying, that a prohibition to sell forms no obligation upon the heirs ; because, if it constituted an obligation, the inhibition would be as effectual to prevent a sale to the injury of the succeeding heirs, as an inhibition is against the proprietor of an unentailed estate selling it to the defeasance of the right of a creditor by bond or minute of sale. The principle therefore is, that a prohibition is a mere restraint, and does not constitute any obligation whatever, either in law or equity.

Another strong proof to me that the public and an heir are in the same situation, and that the former can be affected only through the latter, is, that the public and the possessor of an unentailed estate are placed in the self-same situation by law. If an inhibition be not duly executed against both, it can have no effect. Its object is to secure the landed property of a debtor to his creditor. If the inhibition be not duly executed, the debtor may sell his estate, and the creditor can have no redress. An arrestment may be used to secure the price ; but the inhibition alone will have no effect. The same happens if the inhibition, though duly executed, be not recorded within forty days after its execution. The statute 1581, c. 119. declares, ' that na interdiction or inhibition to be raised and executed hereafter ' be of force, strength, or effect, or onie intention ; bot the samen to ' be null and of nane avail, except the samen be duly registrat, as

'said is.' In the same spirit, the Act 1685 gave power to the lieges to tailzie their lands and heritages, and to affect the same with clauses irritant and resolute, whereby it shall not be lawful to the heirs of tailzie to sell, alienate, &c. If the lieges do not choose to affect their tailzies with irritant and resolute clauses, no other conclusion can follow, than that it remains lawful to the heirs to sell, &c.

It has been endeavoured to assimilate a prohibition to sell, to the obligation constituted by a man providing his estate to his children by an antenuptial contract of marriage, to make that estate or its value forthcoming to them. But to me there does not appear to be the least analogy between the two. The intention is to provide the children, not with this or that estate, but to make a provision for them to the extent of the estate alluded to in the contract. The father is left in the fullest power of administration, in the exercise of which he is understood to act *tanquam bonus vir*, having always in view the intended object of providing for his children, and may therefore sell the estate, or keep it, as he thinks most conducive to the proposed end; and it even admits a greater license, for he may provide for a second wife and family. It is a contract *uberrimæ fidei*, a favourite of the law. It contains no prohibition upon the husband to manage as he thinks proper; but it contains an obligation upon him to provide for his family, receiving the most liberal interpretation, and the utmost support; whereas an entail is *strictissimi juris*, tolerated by the law under certain conditions. It is a deed wherein the granter has respect to one estate, and that alone. All his cares and anxieties bear reference to it. His heirs are to be of that estate, to bear the name and arms of him and that estate, which is to be transmitted to his heirs in *tempore futuro*. If, therefore, the estate be disposed of, his object is frustrated; and he can never be presumed to intend that his heirs shall sell and acquire other estates, repeating such procedure two or three times in a year. The principle is absurd, and the consequences of it expose it to be so. For, only to mention one of them,—I would wish to know who is to determine what lands are to be bought, or how the money is to be laid out in the mean time, or whether lands are to be bought in Scotland or England, or in any other part of his Majesty's dominions? In further illustration of the distinction of the principles of law which I have laid down, I refer to the case of an heir of entail not recording the tailzie. All authorities are agreed, that if it be not recorded, all his deeds will affect the estate. Thus he and the public, in the first instance, are on the same footing: Both are free to act. But the heir who left the tailzie unrecorded, and contravened its prohibitions, would be liable for damages, if there were in it, as there commonly is, an obligation to record the tailzie, because there would be a direct breach of an explicit obligation, which he could be compelled by an action of law to implement; whereas it is decided, that by any action he cannot be prevented or interdicted from contravening a prohibition, if not fenced by an irritant and resolute clause. If in the tailzie there was no obligation laid on him to record the tailzie, he might leave it unrecorded, and be liable to no damages for doing so.

One other consideration strikes me as highly illustrative of my opinion, and proves that in law no claim for damages arises out of the contravention of a prohibition. In the Queensberry entail there was a prohibition to alienate, under an irritant and resolute clause, &c.; and the late Duke of Queensberry let leases, for which he took large



grassums. It is well known that these leases were considered to be alienations struck at by the tailzie, and were set aside; in consequence of which, the Duke of Buccleuch raised actions, in which he claimed from the executors of the Duke of Queensberry violent profits or damages, from the date of the death of the latter; and this he grounded on the principle, that his Grace, by granting such leases, had contravened the prohibition in the tailzie, and thereby deprived the Duke of Buccleuch from drawing the true rents of the farms, which otherwise he would have done. But this Court and the House of Lords both declared, that no such claim arose out of the violation of the tailzie.

The leases were set aside, and that was all the redress that could be obtained. It has been said that there was an irritant and resolute clause applicable to the tacks, and by these the Duke of Buccleuch might have had his redress, and therefore was not entitled to any other. But this is just saying that the prohibition to alienate, which was judged to apply to these leases, was protected by a sanction; and from that it surely follows, that if there be no sanction imposed by the entail, when he had it in his power to add one, the Court is not entitled to add one for him. Would it not be an astonishing proposition, that the Duke of Buccleuch would have been better off if there had been no irritant and resolute clauses, than he was with them? If there had been none, the leases would have subsisted, and his Grace would have obtained damages, if the argument of the defenders be solid; but by having it in his power to set aside the leases, he got none. By the entail being effectual, he was in a worse condition than if it had been defective. But can any man possibly say, that although there were irritant and resolute clauses, there was not also a prohibition which was violated? And as it is from that violation that the claim for damages arises, it appears illogical to maintain, that, because an additional sanction is introduced, that the other, said to be founded in common law, is lost. I am therefore humbly of opinion, that the case of the Duke of Buccleuch against the executors of the Duke of Queensberry is a case directly in point, and settles that the contravention of a prohibitory clause in an entail does not constitute any claim of damages against the contravener.

But it was also argued, that the doctrine of surrogatum applied to this case; because, since the heirs, after the pursuer, would have had right to the estate if he had not sold it, they are entitled to the price as coming in place thereof. To me this doctrine does not seem to apply. Surrogatum takes place only where the absolute property is vested in the person who claims the subject that comes in its place. For instance, when an heiress of a landed estate marries, without conveying her estate to her husband, the right to the rents only belongs to him, while the property of the subject itself remains with her. If they find it convenient to sell the estate, she must concur in the conveyance; and of course the price, coming in place of the subject itself, belongs to the wife, as a surrogatum for the land which was hers. The same principle applies to all the other cases collected under the word Surrogatum—the actual right of property must have been in the person, or his heirs, who claim the surrogatum. But here the heirs of Blackbarony had no right of property in it. They had nothing more than a spes successionis, defeasible at the will of the pursuer; so that, with much deference, I am clearly of opinion that the doctrine of surrogatum does not apply to this case. It must be solely on converting the prohibition to sell into an obligation to re-employ the price, that the defender can have a chance of success;

and I consider that I have distinctly proved, that no such obligation can be inferred, either in law or equity.

Various authorities were referred to by the Counsel for Mr Fullarton, which I do not mean to investigate; 1st, Because I know that some of my brethren who concur with me in opinion, will do so; and, 2dly, Because I know that in the case of Westshiells, part of which estate was sold in contravention of a prohibition, the Second Division found Sir James Stewart liable to re-employ the price. On an appeal, the Lord Chancellor was of opinion that there was no precedent applicable to the case, and remitted to the Second Division to reconsider it; which their Lordships will probably never be required to do, as it has been at rest for more than ten years. I will only remark, that the case principally relied on by the defender is that of Cumming of Pitlurg v. Gordon, 29th July 1761, in which the Court indirectly found that the heir of entail was not entitled to sell the estate, and gave as a reason for doing so, that if he did, he would be liable to re-employ the price. The Court so far altered this judgment in the case of Westshiells, wherein it was found that Sir James Stewart was entitled to sell the estate, although they also found him liable to re-employ the price; and as for the reason assigned by the Court in the case of Pitlurg, the question was not before it, either in the summons or the argument, so that it must properly be considered as *obiter dictum*; and, on these grounds, I consider it to be noway wonderful that the Lord Chancellor held it to be no precedent.

I would add, that the clause conveying the heritable and personal estate belonging to John Murray to his heirs, and taking them bound to convert it into money to be laid out in purchasing land, shows the difference between an obligation and a prohibition; and it would be strange, to construe in the same way clauses totally different in their object and expression.

Perhaps it may be true that John Murray intended to direct his irritant and resolute clauses against a sale; but there is no certainty whether he did or not. In law, his meaning must be collected from his words. He only prohibited his heirs from selling more land than was necessary to pay his debts. They were therefore at liberty to sell if it was necessary, and he must have seen that they might sell more than was requisite; yet he did not, even in that case, impose any obligation on them to lay out the surplus on land to be entailed. And I am of opinion, that as he did not constitute his prohibition in the form required by the statute to bind his heirs, it was lawful for them to use their right of property; and as he imposed no obligation on them in case of sale to re-employ the money for behoof of his heirs of tailzie, the defender, Mr Stewart, cannot be liable for damages or reparation for exercising what was lawful for him to do; for I consider it to be a solecism in law or in reason, that any man shall be liable in damages for doing that from which the law cannot restrain him.

LORDS ALLOWAY and ELDIN delivered this opinion:—This entail being defective in the irritant and resolute clauses, is not sufficient to prevent the proprietor from selling the entailed estate. Accordingly, he has sold a part of it, and the purchaser having suspended payment of the price, the case has been brought before the First Division of the Court by suspension at the purchaser's instance, and declarator at the proprietor's instance, against the heirs of entail, concluding that he had right to sell, and the lands being sold, that he has right to the price as his own money. Under these circumstances, the

question is, Whether the proprietor's claim to the price is well or ill founded?

We are of opinion, that the pursuer had power by the entail to sell the lands in question, and the lands being sold, that he has right to the price as his own money, without being liable to any claim whatever on account of the sale.

It is well known, that before the use of entails in Scotland, with iritant and resolute clauses, all proprietors of land had power, with consent of the superior, to alienate their estates; and when the destination in the charter was so expressed as to transmit the lands, upon the death of the proprietor, to an heir, or a series of heirs, the heir who succeeded had power, with consent of the superior, to make a different destination, and, even without the superior's consent, to alter the investiture of the lands by means of adjudication—a process which the superior could not oppose.

But not long after the beginning of the 17th century, various devices were contrived by lawyers, intended for the purpose of imposing such fetters upon the landed proprietors as to prevent them from alienating or burdening their estates. We are of opinion, that such contrivances were altogether nugatory till the Act 1685 was passed, of which afterwards. It cannot be questioned that the Act is compulsory; but at common law there is no valid entail, and no such entail can be contrived.

Prohibitory clauses were the first restrictions attempted against the heirs of investitures; but they were not sufficient to prevent the proprietor from altering the entail. For he never was without power, in virtue of the right of property, to alienate the lands, or contract debt; and in either case the prohibitions were ineffectual, because no prohibition could prevent a creditor or purchaser from carrying off the lands by his diligence. Nor was the proprietor bound by the prohibitions. A prohibition did not bind him to re-employ the price if the lands were sold; nor to redeem, if they were appraised or adjudged.

Thus it appears that the prohibitory clauses were altogether nugatory, unless they were enforced by inhibition—a diligence which was in use for a long period; but, for the purpose of securing an entail, it is now exploded, and the prohibitory clauses give no disturbance to the proprietor in his selling or contracting debt, because they cannot be enforced by inhibition. See the cases of Bryson against Chapman and Barry, 22d January 1760; Lord Ankerville against Sanders, &c. 8th August 1787; and Lockhart against Stewart, 11th June 1811, in all which inhibition or interdict was refused.

It does not appear that at any time clauses in an entail, when they were merely of a prohibitory nature, and were not enforced by diligence, operated as an effectual restraint upon the proprietors of estates. But they may have had some effect, though they could be defeated; and, very soon after they were introduced, contrivances followed them, apparently of a more powerful nature. The iritant and resolute clauses were soon afterwards invented and employed. Conditions also were sometimes used by the conveyancer. These did not assume the form of prohibitions, or the threatening aspect of iritant and resolute clauses, but appeared in the shape of obligations undertaken by the proprietor, and binding on him personally by the terms of the investiture. Some of these were direct obligations, and others of them were in words intended to operate by means of implication. How far such clauses would be useful amidst a crowd of irritancies, it is

unnecessary to consider, as there are no such clauses in the investiture of Ascog.

For, a direct prohibition to sell is not in the form of an obligation. The proprietor is only prohibited, without being laid under the necessity of obeying the prohibition. He is no more bound against selling the lands, than he would be bound by a prohibition in the entail against committing any other act that had no reference to the management of the estate. Nor is there even an implication in the prohibition, to the effect that it must be construed as an obligation. An entail admits of no implication. The words must be direct and plain in their meaning; but if implication were admissible, there is no implication in the words of a prohibition.

Supposing, then, an entail with irritant and resolute clauses, it is idle in such a case to pretend that prohibitory clauses against selling, &c. can have the smallest effect by implication or otherwise. In such a case, the pretence of an obligation to re-employ the price when the lands are sold is utterly absurd. No such obligation has been expressed in the entail, and no such implication is implied; for some express obligation is necessary to raise an implication of some other obligation. But it is evident that a prohibition creates no express obligation whatever.

Much less does an obligation to re-employ arise from the contravention of irritant and resolute clauses, which accompany clauses merely prohibitory without having an obligatory form. In such a case, the contravention raises no obligation at all.

The true effect and force of the irritant and resolute clauses have not been well understood by the defenders. These clauses were invented merely for the purpose of assisting the prohibitory clauses, and, in the performance of their functions, it must be admitted that they proceed in a manner sufficiently menacing. By these clauses the proprietor is threatened with absolute ruin to himself and his family, if he should happen to waste or destroy the estate, or any part of it, however small. Power is given to all and each of the heirs of entail to bring a comprehensive action for depriving him of the estate altogether, without leaving him the smallest hopes of recovering it, or any part of it. Even his descendants, to the latest generation, are in some cases reduced to beggary without relief, though they are totally innocent of any fault. At the same time, all the deeds of the proprietor which might affect the property of the estate are reduced, and he is not allowed the means of paying his most urgent debts from the rents, however ample they may be. Such is the plan of a strict entail, as is contrived for the purpose of preserving the entailed estate.

Such being the rigorous nature of the irritant and resolute clauses, they have necessarily introduced a considerable relaxation in the legal construction that has been applied to them. Of this the instances are so numerous, that it is unnecessary to enter into the particulars. It is enough to say, that they are so modified in the practice of the Court, that the clauses which appear *prima facie* to be so full of rigour, are seldom extended to the forfeitures so much denounced by the terms of the entail.

It was, however, the object of these clauses to secure a full and complete protection of the entailed estate, and it was thought necessary, 1st, That all deeds of the proprietor against the prohibitions, or in contravention of them, should be void and null, and so declared by the express terms of the entail itself. The reason for adopting such a clause was sufficiently obvious. It was held in law, that every

deed of a proprietor was necessarily effectual against the estate, unless the right was cut off by a quality inherent in it. For it was held, that no man could be a proprietor, without having power to bind his estate, unless his power was qualified by the condition, that all his deeds contrary to the prohibitions should be absolutely void and null. This clause is directed, not so much against the proprietor himself, the contravener, as against the creditor or purchaser, who had by debt or purchase obtained a right which would have been effectual if it had not been so annulled.

It could not be said that the creditor or purchaser had in any way consented to such a condition, but the proprietor himself had consented to it, by accepting of the investiture qualified by that condition; and the superior who had granted the right was held to have power in granting it to qualify it with that condition, or any other condition consistent with law. Besides, the party to whom the property had previously belonged, and who conveyed it to the superior under the same conditions, was held to have power to restrict the terms of his gift, so as to annul the deeds which were contrary to the nature of the gift, and, at the same time, contrary to the same conditions which had been assented to by the superior.

Further, in order to secure the object of these clauses by a full and complete protection of the entailed estate, it was thought necessary, 2d, That the person who should contravene the entail, &c. should forfeit his right, which should become void and extinct, and the estate should devolve upon the next heir appointed to succeed; and that this should be declared by the entail itself. For this the reason is sufficiently obvious. It was held in law, that no man could possess a right to lands, without having power to bind those lands for his debts and deeds. In this view, the irritant clause, though it was necessary, was not sufficient *per se* for the safety of the estate. For it was not enough to declare the nullity of the deed of contravention, and to declare that the creditor or purchaser should obtain no right by or through the deed in his favour. The irritant clause did not take away the contravener's right to possess the estate itself; and while he continued to possess it, the law gave him full and complete power to dispose of it; and the estate was exposed, while in his possession, to the claims of every creditor and purchaser.

Thus the two clauses were held to be necessary as counterparts of the same plan. The right proceeded from the will of the former proprietor, who had the absolute power of disposal; and the power which belonged to him was held to be carried into effect by the consent of the superior. But still it was held to be necessary that all deeds of contravention should be declared void and null; because, if they were not so declared, they were not held as being null and void, although they were contrary to the prohibitions: and that, in every case of contravention, the contravener should forfeit his right, as already mentioned, and that this should be declared by the entail itself; because the nullity of the deeds, though declared by the irritant clause, was not attended with the forfeiture of the contravener, so long as there was nothing in the entail, or nothing declared, to prevent him from retaining his right to the property.

In this manner, the prohibitory, irritant, and resolute clauses, reciprocally assist each other, and are absolutely necessary to preserve the titles of the entailed estate against sales or dilapidation.

But these subtilties of the lawyers, contrived in an early period of the seventeenth century, were of a very questionable nature; and

though there was a decision in favour of an entail, in the famous case of *Stormont*, in which the entail was so defective that it even wanted an irritant clause, that decision never had any authority; and the greatest lawyers held the whole of the plan to be extremely doubtful. In effect, it is humbly thought the plan was full of difficulties, and could not have been supported by the common law. It may be noticed, in particular, that the irritant clause did not annul the act of contravention before declarator: In the mean time, the contravention was valid. Neither did the resolute clause take away the right of property before declarator: The heir still remained proprietor, having right to act as such.

In short, the Act 1685 was necessary to establish the validity of entails. It is thought that no view of the common law could have supported them without the aid of that statute. This is a point which may now be considered as absolutely indisputable, as it has been established by the highest authority in the law, against which nothing of any weight can be stated. See *Stair*, b. 2. t. 8. sect. 48. 58. *Tailzies*.—*Erskine*, b. 3. t. 8. sect. 25.—*Mackenzie*, vol. ii. p. 489.—*Opinions of President Miller, and Justice-Clerk Braxfield, and of Court—Hamilton, &c. against M'Donald*, 3d March 1815; *Fac. Coll.* p. 326. and 327.

It may now be considered more particularly, whether the pursuer is under any legal obligation to re-employ the price of the lands which have been sold? Upon this important question the following considerations may be offered:—

It is quite clear in law, that, before the introduction of strict entails in Scotland, proprietors had power to alter their investiture in virtue of their right in the property, and that without being subject to any claim from other parties; and, of consequence, when they sold the land, they were not bound to re-employ the price of it, but had power to dispose of it as they thought fit.

This is the foundation of the present argument, because it will be found that the proprietors of land at the present day have the same powers, excepting in those cases in which they have been restrained by law from selling, or have incurred an obligation to account for the price of the land when it is sold.

The introduction of strict entails was an innovation, which interrupted, in various ways, the commerce of land; and ultimately, by the statute 1685, c. 22. when it is applied, the heir of entail is deprived of the power of selling. But where that statute has not been properly applied, he has not only power to sell, but, as we conceive, he has power to dispose of the price; for entails, before the statute 1685, were not warranted by any law whatever. And the statute being passed, it did not apply to nor warrant every entail that might be contrived; for the statute, so far from being intended for every entail, is intended only for entails of a certain form, and when enforced by irritant and resolute clauses. And certainly, after the statute 1685 passed, no entail could be effectual but those in which the parties had availed themselves of the enactments of that statute; and all other entails, not being warranted by the statute, were not sufficient to bind either heirs or creditors. And such is the entail of *Ascog*, now in question, as it not only enables the proprietor to sell, but puts him under no restraint as to the price, by re-employing it for the benefit of the other heirs of entail, either by the purchase of land to be entailed, or in any other way. For the entail of *Ascog* is not one of those which contains fetters or obligations binding the pursuer to employ the price: There is

no such obligation in the entail. There is indeed a prohibition to sell; but such a prohibition in an entail that is not fenced by irritant and resolute clauses, is a prohibition which may be legally discharged, as it contains no obligatory force. The prohibitory clause is not binding even by implication, though implication, if it could be alleged in this case, is not admissible in a question of strict entail. Now, the entail of Ascog is one of the strictest nature, with irritant and resolute clauses applicable to the prohibitions. This, therefore, is the case of a strict entail, in which no implication whatever can be allowed.

It is alleged that this is a question among heirs, and that although strangers are entitled to purchase parts of the entailed estate, the pursuer, who is an heir of entail, is barred by his quality of heir from taking advantage of that purchase. But the answer to this is obvious. In selling a part of the estate, the pursuer did no wrong, but only used the right that was competent to him. To pretend that the pursuer did wrong in selling, because he is an heir, is an imagination for which there is no ground whatever. The defenders can point out no authority, either in the statute or in any law, by which the pursuer was barred from selling, nor any law declaring that he did the smallest wrong in selling. In effect, the question among heirs is the very same with the question with strangers who may become purchasers. There is no pretence, therefore, for maintaining, that there is any law or impediment whatever against the pursuer in making use of his right.

Some of the other arguments are still more untenable. For example, it has been stated that the price of the estate is a surrogatum for the estate itself; from which it is inferred that the price, like any other surrogatum, must be employed in the purchase of property to be entailed. But this is an absolute begging of the question, if indeed any dispute on the subject can be maintained. Before it can be made out that the price is a surrogatum, the defenders must establish the fact that they have a right to the price; and if they establish such a right, it signifies very little whether they call it a surrogatum or not. But we conceive that this right of surrogatum cannot be maintained. If it appears that the pursuer had power to sell, and was under no restraint or obligation not to sell; indeed, if he had power to sell, it seems to follow as a necessary consequence, that he has right to the price, because he sold on his own account, and not on account of the defenders.

The defenders have also founded on the principle upon which contracts of marriage are regulated. But we could not have anticipated an argument of that nature; because the obligations contained in these deeds have no resemblance whatever to the obligations in tailzie. A contract of marriage is in every case full of implication, and depends almost entirely upon the good faith of the contractors; whereas there is not the least room in a strict entail for implication of any kind.

And upon the whole of this matter it may be stated with confidence, that the obligations, if such they can be called, in favour of the heirs of entail, cannot be binding in a case in which nothing can be sustained without applying to it the most rigorous construction which is of necessity given to entails. What words are there in this entail that can, without implication, be interpreted as a binding obligation to re-employ the price of the lands which have been sold? Excepting the destination itself, in which the heirs of entail are enumerated, there is not a single phrase in the deed that must not be construed according to the most lax interpretation, before any claim of this nature can be raised upon it. The question then comes to be, whether the rules of interpretation so completely established, are to be wholly abandon-

ed for the benefit of these heirs of entail? So far is this from being tenable, that the defenders would certainly have failed in their case, although the irritant and resolute clauses, which destroy every kind of implication, had been cancelled.

Prior to the statute 1685, the effect of entails depended very much upon imposing the different clauses or conditions in an obligatory form, so as to be expressly binding upon the granter and his heirs, as well as the heirs of entail. This form gave the substitute heirs some protection under the Act 1621, c. 18. But we conceive, that although this statute might have protected gratuitous alienations, as being contrary to any direct obligations entered into, it never could have applied to the present case. This is not a gratuitous sale, but one entered into for a fair and onerous price; nor is it granted to a conjunct and confident person;—two of the essential requisites of the Act 1621, without which it cannot apply.

And even in the case of a deed expressed in an obligatory form, the Act 1621 had no effect against an entail, in terms of the statute 1685; because that statute had the effect to exclude the other as to the penalties, according to the words of Erskine, (1. 7. 22.), that ‘where statute hath inflicted special penalties upon any offence, all others are understood to be excluded.’ Therefore, since the Act 1685, any feeble aid that entails could previously have derived from the statute 1621 was at an end; and, since the passing of the Act 1685, every entail must stand or fall by that Act alone.

Accordingly it will be found, from a due attention to the different cases which have been stated and commented on at great length by the defenders, that there is not the least ground for the conclusion drawn from them.

Before considering those decisions which were so much founded on as establishing the right of the heirs of entail to insist upon the heir selling to reinvest the money, it is important to observe, that notwithstanding the vast number of entail cases that have occurred in this country, and in which entails have been set aside in questions with the heirs, we do not know of a single case in which the heir has ever been compelled to re-employ the money, or the price of the estate sold, in acquiring lands to be entailed in the form of the first entail; nor, with all the industry and ability exerted on the part of the defenders, has a single case of this nature been discovered.

Indeed, as it is admitted that the defect in the entail could not be cured by reinvestment of the price in the same terms, the operation might be entirely nugatory, even if it could be legally enforced; since the very person who reinvested could again sell the subjects whenever he pleased, and must be the sole judge of this matter, and of the nature and situation of the subject to be purchased; which might again be sold as often as the whim, caprice, or interest of the person in possession might dictate, without restraint from any of the heirs.

The only case referred to, in which it is alleged this principle was ever carried into effect, occurred nearly a century ago. But it does not appear to us to have the least weight. This is the case of Lord Strathnaver against the Duke of Douglas, 2d February 1728. The principles upon which that case was decided, have been long ago exploded. It was there successfully maintained, that a prohibition to alienate and to contract debt implied a prohibition to alter the succession, although the direct contrary has been since repeatedly found, both in this Court and in the House of Lords. Indeed we doubt, from the terms in which this case is reported, and from the terms of



the judgment, whether it was the case of an entail to which the strict interpretation of an entail applied. For the granter of that deed, the Countess of Sutherland, imposed obligations upon her heirs; and as her son, Lord Forfar, served heir of line to her, he was universally liable to implement all her obligations of every nature and description. This would have applied to him as heir of line, even supposing he had not been heir of entail, and must, in the same way, have affected all persons representing him. It seems impossible to hold that case to be authoritative in law; every point, in so far as it relates to the construction of entails, being admitted to be erroneous. And there are also other grounds pleaded by the parties in that case, sufficient to show that it is totally inapplicable to the present.

The next case is that of Pitlurg, 29th July 1761, to which a great deal of importance has been attached. The question, as stated by Mr Wight, 'was relative to power of an heir of entail to sell;' and the clause on which that question rested was, that the heirs of entail, in the event of committing treason, should lose their liferent, but that the right, after their decease, should return and remain with their next heir of tailzie; and that the heirs of tailzie 'shall never have power, by any other deed whatsoever, whether treasonable or otherwise, by contracting of debt exceeding the sum of 12,000 merks for provision of their younger children, or any other manner of way whatsoever, to squander or put away the same, or any part thereof, vel faciundo vel delinquendo, any ways contrary to this present settlement.' The whole argument on both sides is merely directed to the point, whether the above clause included a prohibition against selling? And the Court found that it contained a prohibition against selling or alienating the estate, to the prejudice of the substitute heirs of tailzie; and therefore, that however safe an onerous purchaser might be, the pursuer, by a voluntary sale of the lands, would contravene the tailzie, and be subjected to an action of reparation and damages at the instance of the substitute heirs. Upon this the following remarks may be offered.

1. This case, in so far as it adopted a different mode of construction of the entail in a question with heirs and third parties, has been completely overturned by all the cases decided since that time. Perhaps the most nice and difficult cases as to the construction of fetters which have ever been tried were with heirs of entail. Such are the cases of Edmonstone of Tillycoultry, of Lady Dalhousie against Brown, of Henderson, and a great variety of other cases, all of which have been decided in this Court and in the House of Lords, and have completely established the very different doctrine, that there is no distinction in the construction of an entail betwixt heirs and third parties, and that there can be no implication in an entail. This, therefore, is admitted to have been an erroneous judgment.

2. After having erroneously decided that the heir fell under the prohibition to sell, the Court found in that case,—where there was no room for such a finding, after establishing the prohibition,—that by contravening the entail he might be subject to an action of reparation and damages at the instance of the substitute heirs of entail. But after having erroneously adopted the one implication, the Court, upon the same principle, may have implied other obligations. After deciding the first by such a latitude of construction, the same Judges gave an erroneous opinion on the other, although, from the decision of the first point, it was unnecessary to decide the second. This case, therefore, we cannot consider as entitled to any weight whatever.

8. But it was stated that Mr Miller, (afterwards Sir Thomas Miller), who writes the petition for Gordon Cuming, the heir in possession, never so much as argued the present point, but confined his whole argument to there being no prohibition against selling; and that there is no discussion with regard to the question of reparation by either Counsel, which could not have been omitted had it been considered a sound plea.

We think the argument in that case, that there was no prohibition as to selling, was absolutely conclusive, and should have succeeded, as it always did afterwards. But we know that some of the most able Counsel, whose attention and arguments have been applied to one view of a tailzie, which they conceived quite decisive, have allowed other fatal objections to escape them. Without noticing some most extraordinary instances of this, much later than the case of Pitlurg, the recent case of Blairhall may be mentioned. The question was first tried in this Court. Solicitor-General Blair, Mr Charles Hay, Mr Matthew Ross, and another Counsel, were engaged on the same side in that case. Their object was to obtain a judgment that the entail was defective, and that the estate might be sold. It was decided by this Court, and afterwards in the House of Lords, that the entail had not the defect which was alleged. But some time afterwards, the case having come back from the House of Lords, it was discovered that the entail contained no prohibition against alteration of the succession. This had escaped the Court as well as the Counsel. But no sooner had the discovery been made, than a new title was made up, by resignation of the lands for a new infeftment in fee-simple, and the question was then tried and decided without the smallest difficulty; and the estate was afterwards sold.

4. But to return to the case of Pitlurg. There might have been strong reasons for not urging the plea that the heir was not bound to reinvest; for the argument in that case, as to the inadmissibility of implication or construction, could not be stronger than it was upon the point of there being no prohibitory clause against selling. Further, at that time it was not distinctly understood, whether substitute heirs of entail might not, in certain circumstances, apply for inhibition against the heir in possession doing any thing to defeat their right. The case of Bryson was decided only the year before. It was not printed in the Reports until 1772, eleven years after the case of Pitlurg. Neither Mr Miller nor Mr Garden, the two Counsel in the case of Pitlurg, were Counsel in the case of Bryson, as appears by the report; and the case of Bryson could not be held as quite decisive, until it had been followed by the case of Lord Ankerville, and the case of Westshiells, &c. &c.

Now, so long as it was understood that substitute heirs of entail could raise inhibitions according to the old system, before the statute 1685 was introduced, there could be no doubt of an existing obligation. But as this doctrine is totally abandoned, the question must now be considered in a different view. In many cases where an express obligation was constituted in favour of substitute heirs, an inhibition was competent; and this may have led to the opinions of Hope, Mackenzie, and Elchies. It will not be disputed, however, that since the time of Erskine, who expresses great doubt with regard to the former decisions, and since the decisions above referred to, inhibitions upon the prohibitory clauses of an entail are totally incompetent. The nature of entails, and the effect of the statute 1685, from the many discussions which have taken place with regard to that statute, are now

much better understood than formerly. All those authorities therefore evanish, which depend on the competency of inhibition.

Indeed, Lord Elchies' opinion, (p. 110.), and the whole authorities to which he refers, just come to this—That if there be a valid obligation not to alter the destination, or to contract debts, there is no reason why a person should not be bound by such an obligation; and if there be a valid obligation against the maker and his heirs, there is no reason why inhibition should not follow on it: and he founds on the case of Binny against Binny, 28th January 1668, as the authority for his doctrine.

Now, let this case be brought to that criterion. Can inhibition, arrestments, or adjudication, be founded on this entail? It is admitted they cannot. But if there had been an obligation, most certainly one and all of these diligences might have followed, provided the deed had contained no irritant or resolute clauses. But when there are irritant and resolute clauses in the deed, any other clauses imposing restraints are superseded, upon the principle already referred to, and to be further noticed in the sequel.

In the case of Binny, to which Elchies refers, Margaret Binny had granted a bond, obliging herself to enter heir of line to her father, and to resign the lands in favour of herself, and the heirs of her body, whom failing, to the heirs of Alexander Binny, her father, and obliging herself to do nothing contrary to that succession. She having married, conveys the lands to her husband by the contract. But inhibition had been used on the bond before the contract. Now, the Court in that case found that the wife was bound to resign, seeing there was 'inhibition used before the contract; but they did not decide whether this clause would have excluded the debts to be contracted by the said Margaret or her heirs upon a just ground, without collusion; but found that she could not make a voluntary disposition to exclude that succession, in respect of the obligation to do nothing in the contrair.'

If, therefore, any weight could be placed upon the opinion of Lord Elchies, and the authorities to which he refers, it would just come to this, that if there was an obligation either upon the maker or the heir of tailzie, inhibition might be used; but as no inhibition could be used in this case, there is no obligation. And indeed, in the case of Binny, founded on by Elchies, there was a positive obligation by bond upon Margaret Binny and her heirs, and which, quoad the obligee, who was the person with whom the question was tried, was perhaps an effectual obligation, as the question occurred before the statute 1685.

The only other case founded on as supporting this doctrine is the case of Sutherland, 26th February 1801. But in that case we do not see that there was even any argument upon the subject; and it seems to relate to another point altogether. In that case there was a question, whether the destination in the entail was to be regulated by the dispositive clause, or by the procuratory of resignation? The claimant's predecessor had been nominatim called in the dispositive clause, but his heirs had not been called. The question then was, whether it was to be regulated by the dispositive clause, or by the procuratory of resignation, in which the heirs are called? The Court found that it must be regulated by the procuratory of resignation. The entail contained no prohibition against altering the order of succession. The heir in possession had executed a trust-deed, making his trustees accountable, after payment of his debts, to his heirs and assignees. The entailed estate was sold; and the question seems to have been, Who

was entitled to the reversion of the price, after deduction of the entailor's debts,—whether the heirs of entail, or the heirs of the last heir?

As in this case there was no prohibition against altering the order of succession; the general disposition by the heir of entail in possession, in which he makes his trustees accountable to his heirs and assignees, might have been held as an alteration of that succession. If it had, it would have put an end to the claim of the heirs of entail; and if it had not, the heir of entail was entitled to make good his right to the reversion of the price of the lands, according to the entail, the succession to which had not been altered.

We think it unnecessary to take notice of the cases of Westshiells and of Monzie, the first of which was remitted by the House of Lords upon a very full hearing; and the second, we understand, was settled in consequence of the deep impression made by the remit in the case of Westshiells, and of the Lord Chancellor's speech in that case.

We also consider it unnecessary to take notice, at any length, of the decisions of the House of Lords in the Queensberry cases, by which the decision of the Second Division, which had refused the claim of damages, was affirmed, and the decision of the First Division, sustaining the claim of damages by the heirs of entail, was reversed. But these judgments of the House of Lords are of the highest importance, as they adopt the principle laid down by Erskine, already mentioned, that 'where statute hath inflicted special penalties upon any offence, all others are understood to be excluded.'

The case of a strict entail unrecorded was also founded on. The entail is not good against creditors, but may be good against the heir by personal exception. In squandering the estate, while he omitted to record the entail, he does a great wrong to the substitutes, nearly the same as if he had burned the entail in his possession. Besides, registration was intended by the statute merely to operate against third parties.

Upon the whole we apprehend, that the law has been so fixed upon these questions, that there is little room for controversy with respect to them; and if, contrary to our expectation, the same question shall again be thrown open, they must necessarily affect every one of the numerous cases decided during the last forty years in which an entail has been set aside. In the sincere hope that such a general calamity may not take place, we shall conclude the statement of our opinion with the following propositions:—

1. Before the introduction of strict entails in Scotland, investitures could be altered by the proprietor, in virtue of his right of property, and of the rights which followed it.

2. The introduction of strict entail was an innovation contrived by the lawyers, the effect of which was at first very little understood; and its effect remained uncertain, until the law was established by the statute 1685, c. 22.

3. During a period before that statute was passed, the conveyances were subject to implications of various sorts, many of which had no foundation in law. Many entails were supposed to be protected under the Act 1621, c. 18. Some of these were in the direct form; but many of them depended upon mere implication, and sometimes upon supposed implication, assumed without grounds.

4. During the same period, prohibitory clauses were introduced, as obligations by an assumed implication, for which there were no grounds.

5. Entails, before the statute 1685, were not warranted by law; and when the statute was passed, such entails as were not warranted by it, were not sufficient to bind either heirs or creditors.

Accordingly, the rule of law laid down by Erskine, and since settled by the judgments of the House of Lords in the *Queensberry* cases, totally precludes, in the case of a strict entail, any other protection to the estate but the prohibitory, irritant, and resolute clauses of the entail itself; and thus the Act 1621, and every ground of implication whatever, have been rendered of no force in such a case.

But the most striking proof that the entail has no protection whatever but the prohibitory, irritant, and resolute clauses, is the rule now so completely established, that an inhibition upon an entail is not competent.

6. Contracts of marriage proceed entirely upon implication, which is altogether inadmissible in strict entails.

7. The price of the estate has been called a surrogatum for the lands, which must be re-employed in the purchase of other lands descendible to the heirs of entail. But this is an evident mistake. The proprietor had power and right to sell the lands, which were his own property, subject to no claim whatever. If they had remained unsold, they might have descended to the next heir of entail; but having been sold, there was no condition in the entail by which the proprietor who sold them could be deprived of the price.

The only ground that can be assumed in such a case would evidently be an implied condition. But there is no such condition even implied, and any implied condition would be inadmissible.

8. It is alleged, that although third parties are at liberty to purchase the entailed lands, heirs are bound by the entail, and commit a wrong in selling; but this is the worst of implications. It cannot be pretended that there is the slightest vestige of a direct or express rule in law against an heir who sells a part of his estate, and who, in doing so, is warranted by law.

9. The question among heirs is the same as the question with strangers. The law is the same with both; and the implication against the heir is as unfounded as any of the other implications.

10. Where an entail, with prohibitory, irritant, and resolute clauses, is so incorrect that the proprietor has power to alienate or burden the lands, he cannot be compelled to re-employ the price or prices; and if any legal compulsoir were supposed to be competent, it would still be inefficient, because the proprietor could again alienate at any time, without notice to the heirs of entail, and by that means defeat their object; and thus the rule would apply, *frustra petis*.

11. Taking into consideration the foregoing propositions, either singly or collectively, the necessary conclusion is, that no entail with prohibitory, irritant, and resolute clauses, under the statute 1685, c. 22. when the clauses are incorrect or defective, and thereby expose the entail to be defeated by sale, contraction of debt, alteration of succession, or any other defect, can be supported; nor can the prices be demanded of the heirs of entail who have sold or disposed of the estate, because, from the nature of the entail, no process can be issued against them to re-employ such prices.

12. None of the former decisions of this Court affect the question now at issue; and the opinion delivered by the Lord Chancellor in the case of *Westhiells*, when he remitted that case, that there was no precedent applicable to it, is perfectly well founded.

And, finally,—

18. It is not surprising that such is the result of a discussion which demonstrates that every argument of the defenders rests upon assumed implication, for which there is not the slightest foundation in reality, and which, if ever at any time countenanced by some lawyers, has long been completely overruled and exploded.

LORD GILLIES concurred in this opinion.

## No. II.

THE PRINCIPLES on which the JUDGMENTS of the HOUSE OF LORDS in the late Cases respecting the LAW OF ENTAIL rest, and what seems to be thereby established;—referred to at p. 288.\*

I. THE heir of entail in possession by a complete title, is fiar or owner of the estate, entitled to exercise every act of ownership, excepting in so far as he is restrained by the terms of the deed made and registered according to the Act 1685. This is clearly laid down by all the writers since the date of the Act.

This rule seemed to be shaken by the decision in the House of Lords, in the first of the Queensberry cases. The entail did not prescribe any term beyond which leases should not be granted. The House of Lords declared leases for a very long and unusual term to come within the prohibition to alienate; but this was agreeable to what was laid down by some of the best authorities in the law of Scotland, which stated long leases to be 'alienations.'

II. No restraint on the heir in possession is to be raised by implication, nor any right vested in the substitute heirs, that is not clearly given by the entail. The intention of the entailer, however manifest, is not to be regarded, if not clearly and technically expressed in the deed. This was fixed by Lord Mansfield's decision in the case of 'Duntreath,' many years ago, and has been adopted in a variety of cases since.

Lord Mansfield's decision or doctrine in the Duntreath case was, with hesitation, followed by Lord Thurlow, Lord Loughborough, and Lord Eldon, who, as equity lawyers, inclined to think that entails were entitled to fair or liberal construction, and that intention, if clear, as it was in the Duntreath case, might be regarded: yet they held themselves bound by the precedent; and accordingly decided in other cases, where the entailer's intention was equally manifest, as in those of Baldastard, Culdares, &c.

III. The rights of the several parties interested under the deed, and the remedies in case of contravention, can only be ascertained by what the deed itself contains. Judges are not at liberty to go out of it, either to give or take away, however plausible or seemingly equitable the construction may be.

Keeping in view those rules of law, the cases that have been lately decided may be very shortly stated; and it will be obvious that the judgments of the House of Lords are conformable.

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\* These notes were made and communicated to the reporters by the late Mr Chalmer, Solicitor in London, recently before his death, and have been thought not unworthy of preservation.

In the *Ascog* case, or '*Stewart v. Fullarton*,' the heir in possession, taking advantage of an omission or defect in the irritant and resolute clauses to mention 'sales,' though they were in the prohibitive clause, sold part of the entailed estate. The substitute heirs, though they could not prevent the sale, nor set aside the right of the purchaser, argued, that they were injured by the contravention of the prohibition, which conferred a right on them to have the estate preserved, and laid the heir in possession under an obligation to do so; and, since that was not in his power, to remedy the wrong he had done by purchasing another estate, to be settled to the same uses.

The Court of Session, following the opinion of a majority of the Judges, decreed, in favour of the substitutes, that there should be a reinvestment. The decree was reversed, because, independent of what was ordered being nugatory, it was enough that the entail contained no such obligation on the contravener. A prohibition to do one thing cannot be converted into an obligation to do another thing, without violating the rule as to strict interpretation of entails.

The House of Lords not only negatived the proposed reinvestment, but likewise the declaration in the interlocutor, that the seller was not entitled to apply the purchase-money to his own use; and, in the next case, '*Bruce v. Bruce*,' the decree of the Court of Session being, the contravener was accountable to the substitutes for the money received by the sale, the reversal establishes generally that he is not accountable; and to justify this, it is only necessary, according to the principles before mentioned, to say, the entail contains no such obligation. The object of the entail is to preserve the estate mentioned in his deed to all the heirs nominated or described in succession. If the estate is gone irretrievably, there is an end of the entail, and of all right and claim of the substitute heirs. Money cannot come in the place of land. It cannot be entailed. No such thing appears from the deed to have been in the contemplation of the entail; and a Court has only to look to what he has said and done, and is not entitled to add to it.

The case of the '*Executors of the late Duke of Queensberry v. the Marquis of Queensberry*' is somewhat different; but still the judgment of the House of Lords is conformable to the last of the rules laid down above. By the entail of the estate of Tinwald, the Duke was prohibited from granting leases beyond the term of nineteen years, and was required not to let them at an undervalue, but to reserve the best rent that could be reasonably got at the time; and this prohibition was followed up by clauses irritant and resolute. The Marquis alleged, and offered to prove, that the Duke had granted leases much under the rent that might have been procured from good tenants. At the time of his death, several years of the term of those leases were unexpired; and they could not be set aside, as the entail had not been recorded. The Marquis of Queensberry brought an action against the Duke's representatives, claiming damages, which he estimated by the difference betwixt the rent reserved by the leases and that which he alleged might have been obtained. The Court of Session sanctioned the demand, but the House of Lords reversed the decree. According to the principle laid down, the judgment is well founded. The deed of entail, on which alone the rights of the substitute heirs can be founded, gave no authority for such an action. It prescribed the penalty for contravention, that the contravener should forfeit the estate, at the suit of any of the substitutes. Subject to this penalty, and no other expressed, the Duke took the estate; and

it was in the power of the Marquis to enforce it; but he did not—attempting to substitute another penalty as inferrible from the deed of entail, though not directly expressed. The Act 1685 authorizes the owners of estates to entail them, under such provisions and conditions as they shall think fit. The simple and true question in this, as in similar cases, is, Did the deed impose such a condition as that attempted to be imposed? The deed prohibits certain acts, and imposes a certain penalty on contravention. The conclusion is, that the entailor did not think fit to impose any other; and therefore a Court is not at liberty to do so, nor to add a syllable to the deed which is not to be found in it.

Suppose an entail to contain the strictest prohibition to alienate or burden the estate, but not followed up by irritant and resolute clauses;—the entailor has, by the deed, given to his disponee the power to exercise every act of ownership; and, with the same breath, prohibited him from doing so in certain respects. In contempt of the prohibition, the disponee or heir sells the estate or encumbers it. The purchaser or creditor is confessedly safe; but the substitute heirs allege they are injured, and their loss must be repaired. The contravener answers, ‘How can I be subjected to damages for doing what, as owner, the law allowed me to do, and which the deed by which I took the estate laid me under no penalty for doing?’ The substitute says, ‘You were under an implied obligation: You have done an immoral or improper act.’ To which it must be sufficient to answer, ‘There is no room for implication; and, granting what I have done to be improper, or, if you please, dishonourable or immoral, where is the law that subjects me to pecuniary damages? In what Court am I to be tried for the alleged crime? and what Court has right to direct how the money is to be disposed of or distributed, if I were found liable?’ As no law can be pointed out, nor any course which is not merely arbitrary can be pursued, it follows, that the substitutes are without remedy: In short, that the substitutes can have no redress against the onerous deeds of the heir in possession, if the entail does not contain irritant and resolute clauses, in terms of the Act 1685. If the right of ownership remains, the deeds of the owner must stand.

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### No. III.

OPINIONS of the COMMISSARIES in *ROSE v. ROSS*;  
referred to at p. 290.

**MR COMMISSARY TOD.**—The present case embraces two points,—a question of fact and a question of law. The question of fact, respecting the filiation of the defender, George Ross, has been already investigated, and disposed of by a final interlocutor of this Court, finding that the defender is the son of the late George Ross of Cromarty and Elizabeth Woodman. It remains now to consider the legal question, How far he is the lawful son of those persons? This point is argued in the memorials now before the Court.

The circumstances from which the cause has arisen, and the judicial proceedings which have already taken place, are fully detailed in the



pleadings of the parties ; but it seems to be unnecessary at present to recapitulate them. It will be sufficient to observe, that, in so far as not admitted, or assumed for the present argument, the material facts have, in the course of the judicial procedure, been either instructed by evidence, or ascertained by the judgment of the Court.

In arguing the case, the pursuers admit the validity of the marriage of the defender's parents in Scotland ; but they deny its retrospective effects in legitimating the defender according to the known principles of the law of Scotland, on the ground, that, being born a bastard in England, of parents, as they allege, legally and permanently domiciled there, the law of England, which does not admit of legitimation by subsequent marriage, must regulate the legal quality of the defender's status.

The defenders, on the other hand, maintain, that the intermarriage of the parents of the defender in Scotland, his father being a native of that kingdom, inheriting a paternal estate, and also proprietor of an entailed estate in Scotland, which he occasionally visited, must have the effect of rendering him legitimate, even admitting he was born illegitimate in England, and his parents had their principal domicile there. The law of Scotland, it is argued, must exclusively govern the question of legitimacy, which cannot in any respect be controlled by the law of England.

It may be observed, in the commencement, there are many circumstances in the present case, which seem to connect it very closely with Scotland. Thus the pursuers of the action have chosen a Scottish forum to try it in,—their title to sue is a Scottish deed of entail,—their ultimate object is to acquire a landed estate in Scotland,—and, to attain this object, they call in question the ordinary legal effects of a Scottish post-marriage, contracted by a person connected with Scotland by birth and property. All these circumstances, which mark the Scottish features of the case, and which, whatever rule of judgment may be ultimately applied, shew at least the competency of this Court, in point of jurisdiction, to entertain the action, will no doubt be allowed their due weight in the ultimate decision of it, as standing opposed to those circumstances by which alone the case can be characterized as English, namely, the alleged domicile of the defender's parents in England, and his own illegitimate birth in that kingdom.

In proceeding to consider the immediate merits of the question, it appears to me to be the natural course, and the readiest way to arrive at a just conclusion, to begin with examining the legal grounds on which the defender's right to the status and character of legitimacy is founded, and then to consider the grounds in law on which his claim to that character is challenged.

This claim to legitimacy rests upon the well known principle of the law of Scotland, by which children, though born out of marriage, become, upon the marriage of the parents, legitimate children, and are so viewed in every question of status and succession.

It is believed, that, with the exception of England, wherever the civil and canon law have been received in Europe, this doctrine of the legitimation of children born before marriage, by the subsequent marriage of their parents, has been recognized. In Scotland, according to all our systematic writers, it has for many centuries formed part of the undoubted law of the country. It is quite unnecessary to take up time by any particular examination of it, because the doctrine itself, as well as the principle on which it rests, are perfectly well understood.

To support the doctrine, the law supposes by a fiction the parents to have been married at the time of the child's conception. 'Consequently (says Mr Erskine) no children can be thus legitimated but those who are procreated of a mother whom the father at the time might have lawfully married. If, therefore, either the father or the mother were at that period married to another, such child is incapable of legitimation.' The doctrine then rests upon the legal fiction, that the parents of the child might have lawfully intermarried at the period of conception; in other words, that they were not at that time prevented from marrying by any known disability, either canonical or civil. Hence it would appear, that, wherever there is room for the fiction, there the doctrine will apply. There then exists no mid-impediment, as it is technically called, and legitimation of the children will ensue. But, on the other hand, wherever the ground of the fiction fails, there the doctrine will fail also. If the parents, at the time of the conception, could not have lawfully married—if they then laboured under any legal disability, their union in that case is held to be meretricious, and the children begotten of it are considered to have been begotten in adultery. A mid-impediment then intervenes, which is fatal to the application of the doctrine, and no legitimation can follow upon the subsequent marriage of the parents.

The law of legitimation, and the principle which supports it, being thus clear, there seems to be little difficulty in applying it to the case of the defender. The validity of the marriage of the defender's parents in Scotland is not disputed, neither is it seriously alleged that either of them could not have lawfully intermarried at the period of conception. It is not alleged that they were prevented from doing so by any incapacity whatever recognized by our law. And hence, there does not appear to be any mid-impediment (at least in the view of the law of Scotland) of such a nature as to defeat the fiction on which the doctrine of legitimation is supported.

The pursuers have, indeed, made a faint attempt to shew, that the ground of the fiction is inapplicable to a case where both the parents being permanently domiciled in England at the time of the procreation, they could not, it is said, by law, have intermarried without a regular celebration in facie ecclesiæ. But this can create no mid-impediment in the eye of our law, which holds the place where the parents may have been to be of no consideration, provided only they could have legally intermarried at the required period. If, in short, the parents of the defender could have lawfully intermarried at the time of conception, it is indifferent where they happened to be—whether in England or in Scotland. The possibility of a matrimonial union at the period of conception is all that the law of Scotland requires; and the possibility existed in the present instance.

Such being the legal grounds on which the defender's claim to the status of legitimacy rests, I proceed next to consider the grounds on which his right to that character is challenged.

The law of England, as it is well known, does not recognize the doctrine of legitimation by subsequent marriage, as received in this country. The general object, therefore, of the pursuers, in bringing the present action, is, by the aid of that law, to subvert the acknowledged principles of the law of Scotland, as otherwise applicable to this case; and, by introducing those of the law of England, in this way at once to bastardize the defender, and supersede the natural operation of the law of this country. The question, thus viewed, becomes undoubtedly one of very general interest and importance,—not merely as affect-

ing the parties, but the community at large; as the discussion of it necessarily leads to the investigation of those general principles of jurisprudence by which the most valuable rights of society are governed. It has been brought for trial in a competent forum, accustomed, however, to decide according to the rules of Scottish law. These may, no doubt, in a certain degree, be displaced, in particular cases, by the conflictory rule of a foreign law: But it is at least incumbent on those who plead for such a construction, to prove the necessity and justice of it, in opposition to the known law of the forum where the suit is instituted.

The basis on which the pursuers rest their argument is the fact which they find it necessary to assume, that the defender's father, the late Alexander Ross, was exclusively domiciled in England. It is admitted, that his mother Elizabeth Woodman was born and domiciled there. It is also admitted, that the defender himself was born in that territory. But, little stress seems to be laid on either of these circumstances: The whole argument is placed upon the assumed fact, that the late Alexander Ross, though born and married in Scotland, and proprietor of a landed estate there, was nevertheless exclusively domiciled in England. The question, they say, is just the same as if two English persons, having no domicile in this country, were to come to Scotland with the view of going through the ceremony of marriage, for the purpose of legitimating their children born in a state of bastardy in England, and thus to disappoint their lawful heirs.

Assuming this to be the state of the fact, the pursuers then proceed to argue, upon general principles, that the law of the domicile should govern this case; which, they endeavour to shew, differs essentially from the important cases of divorce, which some time ago so much occupied the attention of this Court and of the Court of Session. They contend, that neither the decisions in those cases, nor the principles on which they were determined, can be held to extend to the case which they have assumed to be the case now before the Court. On the contrary they assert, there were various doctrines laid down, and generally acceded to by the Judges in those cases, which go far to support the proposition which they maintain, namely, that the status of a person, with regard to legitimacy, depends on the law of the place where his parents were domiciled at the time of his birth.

Upon a careful review of this argument, I feel inclined to be of opinion, that the pursuers are mistaken, not only in the premises on which the general superstructure of their reasoning is raised, but in the legal conclusions which they deduce from them.

In the first place, I cannot assent to the proposition which they find it so necessary to assume, that the late Alexander Ross was exclusively domiciled in England. It appears to me, that Alexander Ross was not exclusively domiciled in England, in the sense, and to the effect contended for by the pursuers,—but, that he had a separate and independent connexion with Scotland,—where he was born,—where he inherited a paternal estate, and possessed also a valuable entailed estate, which he was in the habit of occasionally visiting,—and where, finally, he was married. Although, therefore, England appears to have been the country of his fixed abode, yet he was still connected with Scotland, as well *ratio originis* as *rei sitæ et contractus*. It does not always follow, that the first of these domiciles must of necessity exclude the other, or that the latter must necessarily be lost and absorbed in the former. Though a person can have but one kind of domicile for the distribution of his intestate per-

sonal succession, he may at the same time, very consistently, have two or more domiciles for other purposes,—totally independent of each other,—of different descriptions, and applicable to different legal interests. Accordingly it appears to me, that Alexander Ross, though permanently domiciled in England, never lost his Scottish domicile,—being always connected with Scotland as his birth-place,—the seat of his real property,—and the place where he contracted marriage.

The question, then, in this view, comes to be, which kind of domicile should obtain in a case of status, in preference to another? or, how far, in such a case, one sort of domicile should be controlled by another?—The pursuers argue, that the domicile of residence should exclusively prevail. But I humbly think otherwise. The domicile of residence no doubt governs the distribution of intestate succession,—but upon principles which demonstrate, that it should not be exclusively the guide in a question of status. It rests upon a fiction, that *mobilia non habent situm*, and that in the absence of a declaration of will, the law presumes that the place of a man's residence is the best interpreter of his will. But this cannot avail here. There is no secret as to Alexander Ross's intentions to legitimate his son. He declared his will to do so, as well publicly by his marriage in Scotland, as privately in his settlements. Therefore, if this question were to be affected at all by domicile, in the sense taken of it by the pursuers, and exclusive of that sort of local residence which is necessary to found jurisdiction and citation, in my opinion it should be the Scottish domicile, and not the English domicile of mere residence that should obtain. According to a distinction taken by the Roman law, Alexander Ross was a *civis* of Scotland by birth and real property, and an *incola* of England merely by residence. His connexion, therefore, with Scotland, should be held to be greater than his connexion with England; because the character of *incola*, which arises from domicile, is less permanent and indelible than the character of *civis*, which arises from an original capacity of honours, and an original liability to perform public functions. *Potentius esse jus originis quam incolatus, si de honoribus eodem tempore, in duabus civitatibus questio sit: Voet. lib. 5. D. tit. 1.* In short, the opinion I entertain upon this point is, that the domicile which arises from the combined sources of birth and extraction, of *res sita*, and of contract, should prevail in competition with the domicile of residence exclusively so considered, in so far at least as regards the privilege of legitimating children by a marriage in Scotland subsequent to their birth.

But, in the next place, admitting, for the sake of the pursuers' argument, that the late Alexander Ross was exclusively domiciled in England, it appears to me that they are mistaken in the legal conclusion which they deduce from that circumstance. The status of a person, with regard to legitimacy or illegitimacy, does not, according to the views recently taken of our law, depend upon the law of the place where his parents were domiciled at his birth, or indeed upon any principle of domicile whatever, further than that which is necessary to found jurisdiction to entertain the cause. A question of this nature must be determined by a totally different principle, namely, by the rule of law which prevails in the forum where the suit is entertained. At least, apparently, so it was determined in those important cases of conjugal status which have been already alluded to. And although this case, in point of circumstances, is not precisely similar, yet, in point of legal principle, the analogy betwixt them appears to me to be so

close and intimate, that I should conceive we are bound to decide it by a strict adherence to the rule prescribed to us by the Supreme Court in those cases. In this view, it may be perhaps unnecessary to enlarge upon topics, which, having been so fully canvassed upon recent occasions, must be familiar to the Court. But as the subject, in its present aspect, presents itself in a new, and (as far as I know) in a hitherto untried form, it may not be improper to advert generally to those general principles by which questions of personal status are at present thought to be regulated.

The principle of *Comitas*, or rather of utility, by which concession is made to the law of a foreign state, must necessarily be received with much limitation; otherwise, by the too promiscuous introduction of an imported system of jurisprudence, the administration of justice, if not rendered altogether inextricable, would, at all events, be greatly impeded and obstructed. Accordingly it would appear, that foreign municipal rules are permitted to operate *extra territorium* only in that class of laws which relates to forms and solemnities. These are not of the essence of an act which constitutes or dissolves a right. They are received as evidence merely of the will or consent on which the right depends, but by no means as a recognition of the law of a foreign state.

The principle which acknowledges foreign law, seems to go no further than this. In general, whatever is of the essence of legal rights is carefully excluded from all interference of foreign municipal rules of law. For instance, they have no place in the extensive class of positive laws which directly attach on property, whether moveable or immoveable, with an exception, however, as to moveables, which, by a fiction, are held to be in the place where the owner resides, and the law of that place in many cases affects them, though in point of fact they are in a different territory. In like manner, foreign rules of law are utterly excluded from cases of Crime, and, in general, from the whole of the large and important branch of jurisprudence which comprises the *jus publicum* of a state, under which are comprehended all those laws which impress upon individuals personal quality or status, whatever that may be, or however derived. These, and all laws of a similar description, pertaining to the administration of that department of internal jurisprudence which operates directly upon public morals and domestic manners, exclusively belong to the municipal system of the country where they happen to be administered. They are deemed too important, and are too much incorporated with the general frame and constitution of society, to be suffered, in the remotest degree, to yield or give way to the dictates of foreign law.

The question, by what law personal status should be determined, has, no doubt, been the subject of much controversy among the civilians. According to one theory, *statuta personalia*, whether constituted by the act of the law, or by the positive agreement of parties, were held to operate universally *extra territorium*; so that every quality of status impressed on an individual in the place of his birth or domicile, was esteemed to be indelible, and accompanied him wherever he went. But the erroneous views on which this doctrine of the indelibility of status is founded, have been long ago exposed and confuted in the most satisfactory manner by many authors, particularly by Voet, the most judicious of all the commentators, who shews, with much ability, from general principles, that personal statutes can no more be suffered to operate *extra territorium* than real ones; and who proves, by conclusive reasoning, that the opposite rule for the universality of status,

could not be applied without the utmost inconsistency and absurdity. The idea, indeed, of indelibility or unchangeableness of personal status, is too subtle and refined to be applied to the practical purposes of law, which, to be useful, always requires something tangible to operate upon. Such, accordingly, appear to have been the principles which were found to govern the cases of conjugal status so often alluded to. The jurisdiction having been sustained in those cases, and the cases themselves supposed to be cleared of the legal suspicion of collusion, this Court, in obedience to the instructions of the Supreme Court, recognized in the first instance this relation of husband and wife as a relation universally acknowledged *jure gentium*; and this, not from any supposed deference to the law of England, but on the ordinary rules of our own law, as affording evidence of the consent of the parties to bind themselves in a relation which has a just claim to universal protection and regard.

But beyond this concession the Courts here would not advance a step. The relation of marriage was considered not only to rank first in point of importance, but to be in every respect different from all other personal contracts whatever. Although established by positive agreement, it cannot, like other consensual contracts, be dissolved, nor modified, by the will of the related persons. Regardless, therefore, of any supposed quality of indelibility in the status, the effects flowing from it as to the rights and duties of the parties, and the modification as well as the dissolution of the union, were found, upon the principles I have endeavoured to explain, to belong to the exclusive regulation of the law of the country where the remedy for a violation of the contract was applied for, and within whose jurisdiction the parties were found to be legally placed. The question, in this view, was considered to be strictly one of public law, which could never be compromised by an appeal to foreign rules, and foreign doctrines of expediency. In a matter of such vital importance, it was thought to be contrary to all principle to yield to the dictates of a foreign law; or to administer any other redress than that which was consonant to the principles of the law of Scotland. The result accordingly was, that upon proof of adultery committed in Scotland, (though, in a civil remedy, it is plainly indifferent where the crime was committed), the Scottish remedy of divorce *a vinculo* was pronounced in favour of persons, born, domiciled, and married in England;—and this not only in direct opposition to the law of England, which holds marriage to be indissoluble, but also expressly against their own agreement, as implied in marriage-contracts duly solemnized in their own country.

Such being the result in those cases of matrimonial status, it seems impossible to apply any different principle of decision to a case involving the status of legitimacy. These two important domestic relations are coeval with society itself, of which they are the basis and the support. It is, therefore, most essential towards every thing which relates to the preservation and well-being of society, that the numerous and important rights and obligations incident to them should be regulated by one uniform and consistent rule. To apply different rules to relations so apparently identical, and so much linked together, would be productive of the utmost disorder and confusion. In their essential nature and qualities they are the same: they differ only in their modes of constitution. The relation of husband and wife is a case of contract, which, in so far as regards its constitution, is universal; but in whatever regards its effects, it is neither universal nor permanent. The relation of parent and child, again, is not a case of contract; for

an unborn infant cannot be a party to a contract. The status of legitimacy is a character which the law allows the parents to impress upon the child, as being the immediate sources of its being. But the rights and obligations resulting from the relation, the adjuncts and qualities belonging to it after it is constituted, are no more universal nor permanent than those resulting from the relation of husband and wife. The effects, in short, following from both relations, must be regarded and treated in every respect upon the same footing. They together form a most important part of the public law of Scotland, and therefore, upon the principles already explained, cannot be suffered to give way to the dictate of any foreign law whatever. The pursuers, indeed, do not seem seriously to deny the principle as applied to the case of divorce a vinculo, but, by inference, wish to form an exception to the application of it to the case of legitimacy, upon the grounds that the decision in the cases of divorce was influenced by the existence of a contract of marriage, which does not exist here, and by the supposed absence of collusion in those cases, which, according to their views, does exist in the present case.

As to the exception from the absence of a contract in this case, it appears to me that the inference deduced from that circumstance should just be drawn the other way. It will be observed, these were the principles of decision contended for in those cases of divorce—the laws of the jurisdiction of the contract, and of the domicile. But an union of any two of those principles against the remaining one should add apparent strength to the plea in favour of which they were united, on the one hand,—and weaken, on the other, the remaining contending plea. It happened accordingly, in the divorce cases, that the law of the contract, and that of the domicile, were combined against the law of the jurisdiction. Yet, such was the strength of the latter, that, standing alone, it prevailed over the two former united. As therefore, in the present case, there is no such combination against the law of the jurisdiction, it appears singular that the absence of that circumstance should be used as an argument against it.

But as, on the contrary, the law of the jurisdiction is here united with that of the contract against the domicile, it would seem to follow, that, if singly the law of the jurisdiction prevailed over the other two pleas combined, there is greater reason for its prevailing, when it is assisted, not opposed, by that of the contract. If, in short, the law regulating the status of married persons in the country where the remedy is sought, was found not to yield to the domicile of residence, when aided by the will of the parties, as implied in the most solemn of all engagements, a contract of marriage, and that too indissoluble by the law of the country where contracted, there is apparently much greater reason for their not giving way where the will of the parties does not stand opposed to the law of the country where redress is sought—on the contrary, where their will is clearly consonant with that law.

With regard to the exception founded on the alleged collusion of the defender's parents against the law of their domicile, nothing apparently can be more mistaken than the view taken by the pursuers upon this point. Divorces obtained by collusion were held to be illegal, not because they are so in England, but because they are inconsistent with the law of Scotland. But a charge of collusion and fraud, when applied to the constitution of a marriage in this country, betwixt parties, not only entitled, but invited so to contract, is altogether groundless. Besides, as has been properly observed, local disqualifications do not extend beyond the territory. And accordingly it is held, even in England,

that English minors escape from the disqualifications of the English marriage law, by passing into Scotland and marrying here; nor was it, I believe, ever understood, that a marriage at Gretna Green should be annulled, on the ground that the parties had committed a fraud against the law of their domicile. But whatever view the law of England may take of the subject, it appears to be quite clear, that the law of Scotland will never hold that the late Alexander Ross was guilty of a wrong, in availing himself of the law of his native country, by marrying in it for the purpose of legitimating his son.

It remains briefly to take notice of the decided cases, to which the pursuers have referred in support of their argument. All those to which reference has been made, as relative to the constitution of domicile, have evidently (at least according to the views I have of this case) nothing to do with it. The cases of Shedden and Strathmore are those which approach nearest to the present case; but they both differ from it in a most essential particular, namely, the place where the marriage subsequent to the birth of the children took place,—in neither of them was the marriage celebrated in Scotland.

In Shedden's case the marriage was contracted in America, the law of which country does not recognize legitimation by subsequent marriage. Neither of the parents in that case ever even visited Scotland after entering into the marriage in America; so that in no respect could the marriage in its offspring derive any aid from the law of Scotland.

In the case of Strathmore, again, the circumstances were nearly similar—the marriage having been celebrated in England, the law of which country, in like manner with that of America, rejects the doctrine of legitimation. Lord Strathmore, besides, was not even born in Scotland. He was held to be a British baron; and the Lord Chancellor seemed to think, that a British barony could not be claimed contrary to the law of England. At any rate, the marriage was exclusively English, and the parents, subsequent to it, did not even visit Scotland; so that here, likewise, the marriage could derive no support from the law of Scotland.

With regard to the inferences drawn from the speeches of the two learned Lords who delivered opinions upon the case of Lord Strathmore, it is enough to observe, that the first of these eminent Judges, with proper caution, expressly guarded against giving any opinion upon a case not actually before him. And although the other learned Lord may have incidentally thrown out what was the present impression of his mind upon any hypothetical case, yet such an obiter dictum cannot have much influence in the decision of a case which was not under his special consideration.

To conclude, upon the grounds which I have stated at so much length, I am of opinion, that as the defender has been already assoilzied from the first conclusion of the libel, he ought, in like manner, to be assoilzied from the second; which in effect imports, that he is entitled to the status of legitimacy, and to the rights belonging to it.

MR COMMISSARY FERGUSSON.—There are some facts in this case, which, when considered in connexion, seem to distinguish it from any other which has been hitherto decided.

Alexander Ross, the defender's father, was a native of Scotland. During his infancy and early youth, he could have no other domicile but that of his parental home in this country. When he entered into the business of life, and became *sui juris*, he had the choice of his own



domicile, to be fixed and afterwards altered at his pleasure, or as circumstances might dictate. He certainly did then make England the country of his only permanent residence, settlement, and home. That is to say, according to my conception of the legal sense of the term, his sole domicile was English, from the time he chose the profession he was destined to follow through his life. But he did not therefore become an alien in the country of his birth. For England and Scotland had become one kingdom and realm by their union, as to all questions concerning citizenship and allegiance. His son, the defender George Ross, was afterwards born in England of his connexion, then illicit according to the laws of both countries, with an Englishwoman,—and, being still a minor, could have no other domicile but that of his mother originally, or afterwards that of his father by virtue of their marriage. The defender was not, indeed, on that account, an alien in the native land of his father. On the contrary, both father and son, as to citizenship and allegiance, were neither Scotch nor English, but, in truth, British subjects; and, while no impediment had intervened to prevent his legitimation per subsequens matrimonium, the defender's parents were regularly married in Scotland. But this marriage took place without any change in their domicile, which, as to both parents, and likewise as to the son also, (who, while illegitimate, could have no other domicile but that of his mother), clearly did remain exclusively in England at the date when this marriage was celebrated.

From the facts, according to this summary, the question arises, Whether the character of illegitimacy which affected the defender at his birth, and which, according to the rule of the English law, could not be altered by the subsequent marriage of his parents, if it had taken place in England, has nevertheless been removed from him by their marriage in Scotland, where the municipal rule, on the supposition that it applies to govern his case, would render him legitimate?

The objections, if there be any, which may occur to this manner of constituting the question, supposing it to be open, must arise from other considerations which I am altogether unable to define, except the main and most important plea of *res judicata*, which, if sustained, must end the debate in this forum.

Jurisdiction, at least to entertain the action, is however constituted here by the act of the pursuers, who call the defender and his tutors in this declarator of bastardy, and by their appearance. It is supported by the great and manifest interests of both parties in the cause. Nor can it be affected by the consideration, that the nomination of the tutors may become void, and that the defender's *persona standi in judicio* here may eventually be taken from him, if a decree given in terms of the second conclusion against him shall reduce him to the condition of an illegitimate English minor under the guardianship of the Lord Chancellor. For the validity of that conclusion is the very subject of the remaining controversy in this suit.

Accordingly, in order to prepare the case for argument on the merits, by our interlocutor, on the revised condescendence and answers, of the 29th November 1822, we not only disposed of the first conclusion of the summons relative to the defender's filiation, but also in effect, though not in terms, found, on the facts of the case, that, while his mother had always been a domiciled Englishwoman till her marriage, his father's only domicile, from the time he left his native country in early life to enter into business, had likewise been constantly in Eng-

land. Against this part of that interlocutor the pursuers reclaimed, and they could not be prevented from laying open for amendment this point of their own case. Thus, however, it has become impossible now to proceed to give a judgment on the merits of the cause, without first disposing of these preliminary matters of fact anew. Yet upon the evidence in the proof since led, and productions made for the defender, and the most careful re-examination of the whole process, no grounds have been discovered for taking a different view of these matters now, from that which was originally entertained. Therefore, and in order both to complete the record, and at the same time to afford full opportunity of reclaiming, if any error shall be supposed to exist, I humbly conceive that we should now find anew, and in more precise terms, that, according to the facts judicially averred, and either proved, or admitted, or not denied, the domicile of the defender's mother was exclusively English till her marriage; and that the domicile of his father likewise was always in England, during a period of his life commencing long before the date of the connexion between them of which the defender was the offspring, and continuing at, and even long after the date of their marriage.

To prevent misunderstanding it is necessary to add, that the term domicile is always used by me, in this question, in the only sense which I believe it to bear in correct legal language,—namely, as that which a jury would find, if disputed, and by which the disposal of personal succession ab intestato would be governed. For it is a self-evident proposition, that no man, at any given point of time in his life, can have more than one domicile in this sense; nor am I aware that a case has ever occurred in British jurisprudence, where it was found impossible, from perfect equality in the scale of circumstances, to determine what this domicile was. Certainly here, at least, there is no difficulty on that head.

Therefore, holding these matters of fact to be already ascertained under the qualifications now stated; the grounds on which the conclusions of the pursuers appear mainly to rest are, that England, where the law does not admit of legitimization per subsequens matrimonium, was the place of the defender's illegitimate birth. Secondly, That the domicile of both his parents was England, both at the time of his conception and birth, (his mother, in particular, having never had any other domicile), and continued to be English at the date of their marriage. And, thirdly, That although the countries of England and Scotland have become one realm, and the natives of each are citizens of the other; yet, by the terms of the compact of union, the territory and dominion of their several laws remains as entire and distinct as these stood before they became subject to the same legislature;—and therefore, (according to the assumption of the pursuers), it is by the criterion of the domicile of the defender's parents and himself alone, that it is possible to determine which of those laws shall be taken as the rule for judgment, where the personal status of a British citizen is the subject of dispute in any case of collision like the present.

Upon the other side, the circumstances and principles from which the defender's plea seems chiefly to derive support are, in the first place, the favour of the law, which, in all civilized nations, is on the side of legitimacy; and although, by the English rule, this status cannot be conferred upon a natural child by the subsequent marriage of his parents in England, yet the principle of favour to legitimacy, in general, is not less clearly acknowledged in the jurisprudence of England,

than in the codes of the neighbouring nations. For it is understood, that every child born after the marriage of his parents, within the territories of the English law, is legitimate, even although it may be physically impossible that his conception could have taken place after the celebration of that marriage, or that he could otherwise come to be regarded as the offspring of this marriage but by the favourable construction of the law, which must, in all such cases of physical impossibility, stand in violent and manifest opposition to the real state of the fact. Secondly, Our own law of Scotland, in conformity to that of the whole civilized world while under the Roman empire, and to the canon law, and to the rule which still prevails in all the countries of Christendom, except those which are governed by the common law of England, has, for many centuries, held that the status of legitimacy is conferred upon the children born in concubinage *per subsequens matrimonium* of their parents without mid-impediment. Thirdly, According to all authorities of the Scots municipal law, it decidedly favours that change in the connexion of parents from concubinage to lawful matrimony, which makes better provision, than the illicit connexion could afford, for cultivating those pious affections, and performing those pious duties between parents and children, described in all languages as peculiarly sacred, by an epithet never otherwise correctly applied except with reference to what is divine; and especially by preventing the cruel hardship which the children of the same parents, born illegitimate, must sustain, when they not only forfeit all inheritance of status or property, but also see their younger brothers or sisters born after the legal union of their parents by subsequent marriage without mid-impediment, even when unlawfully begotten like themselves, succeed to their utter exclusion. Lastly, It is urged, and with altogether conclusive effect as to this tribunal, if the plea itself be well founded, that the final decisions of the Superior Court in directing us to proceed in the actions of divorce a vinculo of English marriages betwixt English parties when convened in judicio here, are precedents to govern our judgments also in the present question.

To this last point of the argument, it is therefore evident that the attention must be first, if not exclusively devoted, because there can be no occasion to inquire further, if there be a *res judicata* which determines the matter. Nay, even although the terms of these judgments, as they stand in the record, should not directly or obviously apply, yet, if the opinions of the majority of the Judges of the Superior Court did clearly establish, that they meant to lay down the rule as applicable in the circumstances of the present case, it is not to be denied that this inferior consistorial judicatory ought also to dispose of it as one entirely of the Scots municipal law; and no duty can remain to be now performed here in this case, but that of mere obedience.

It will, however, be readily granted, that, in such inquiries, no supposed analogy should be adopted as the ground of determination without the greatest caution.

Now, it is from no act or contract of his own that the defender derives his whole plea. That plea rests exclusively upon his filiation as the natural son of Alexander Ross of Cromarty by Elizabeth Woodman, and upon the subsequent marriage of these persons without mid-impediment to his legitimation thereby. The objections are, that he was born illegitimate in England, by the law of which country his status could not become that of a lawful son by the subsequent marriage of his parents;—and that, although his parents' marriage was

celebrated in Scotland, where the rule is different, the *locus contractus* is unimportant, because the domicile of these parents was England during the whole period of time in which the only transaction that can relate to or affect this claim, took place. To repeat,—in order to prevent all possibility of misapprehension,—the defender's filiation as their natural son, and the marriage of his parents alone, are all he has to found upon in matter of fact; subject to the constructions and qualifications imposed by the several laws of the two countries from relative circumstances.

On the contrary, every case of divorce must take its rise from the obligations of the contract of marriage said to be violated, and from the subsequent acts of the party accused of violating that contract. Consequently, in all cases of divorce, the inquiry must commence at the date of the marriage of the parties themselves. But, in every case of legitimation or bastardy, the inquiry terminates at the date of the marriage of the parents of the party by whom the status is claimed. In the latter, too, the inquiry is exclusively limited to the acts of the parties to the contract themselves. But, even now, this minor defender is not *sui juris*; and, if he should have the misfortune to succumb in the present action, his father's nomination of tutors to him would fall to the ground, and, as a natural son born in England, he would be placed under the guardianship of the Lord Chancellor there.

Accordingly, the departments in the law to which these several cases belong, have always been regarded by the highest authorities,—indeed, so far as I know, by all authorities, of every system of law,—as distinct, and as governed by different principles.

In those English cases of divorce, marriage was held, in the judgments pronounced, to be a contract *juris gentium*, which, under whatever law it might be constituted, must receive effect according to the rules that prevail in the country where it comes to be pleaded, either in order to force performance of its obligations, or to seek redress for the violation of them. But, on the other hand, in the case of Shedden against Patrick, where a question of bastardy was incidentally tried, but, in truth, constituted the whole case, and which, being affirmed upon appeal, is universally regarded as a precedent of the very highest authority, the marriage of the parents of Shedden in one of the States of North America, where the rule of the English law prevails, although, in a case of divorce, that marriage would just have had the very same effect here as if it had been celebrated in Scotland, yet it had none whatever to legitimate Shedden, the natural son of the parties to that contract, merely because the *lex loci* had attached no such consequences to their subsequent marriage. For it must be observed, that the circumstance that the parents were aliens is evidently of no importance to the point now under consideration, since their marriage was not the less, on that account, a contract *juris gentium*. Such evidently, at least, was the import of the decision in Shedden's case, although his father, like Alexander Ross, was a native-born Scotchman,—inherited a Scotch estate,—and had visited Scotland and his estate here during his residence in America,—but, like Alexander Ross, without changing his domicile anew. If then those actions of divorce, and this action of declarator of bastardy or legitimacy, do really and clearly belong to different categories or departments in the law, it is likewise a circumstance evidently unimportant and irrelevant here, that the decision in Shedden's case bears date before the judgment of the English action of divorce. Unaffected by these, it therefore remains confessedly a good precedent at this day, indeed one of

the very highest authority in the different class and department to which it belongs.

No doubt, in other respects, that precedent, while it sufficiently proves that the present question is open, can supply little to aid us in forming a judgment upon its merits. For, in the case of Shedden, the birth of the natural child, and the subsequent marriage, and also the domicile of the parents, were all foreign, and in a country the law of which does in no case bestow upon natural children the status of legitimacy, as a consequence of the subsequent marriage of their parents. Unfortunately, too, the learned Counsel in this cause have been able to adduce no precedent whatever of legitimation relative to a case where the conception and birth of the natural child took place in a country, the law of which does not admit of legitimation per subsequens matrimonium, and where the chief and permanent domicile of the parents was likewise in that country, although their marriage was celebrated in Scotland.

In the very recent case, indeed, of the Strathmore peerage, the opinions of the Lord Chancellor, and of Lord Redesdale, delivered in the Lords' committee, likewise related to a pure question of legitimation per subsequens matrimonium, where both child and parents were British; and as that case was decided according to those opinions, it is to be regarded as the latest, as well as the highest authority on a question of legitimation per subsequens matrimonium in England, in opposition to English birth and to the English domicile of the parents. In accordance with these opinions, it was there virtually found by the House of Lords, that the claim to legitimacy is not tenable, in a case where both the illegitimate birth of the claimant, and also the subsequent marriage of his parents, have taken place in England. For, it was only through the medium of legitimacy that Mr Bowes, the petitioner in that case, could claim his father's peerage; just as Shedden could only claim to be served heir to his father's estate in Scotland through the medium of his alleged legitimacy. Both cases, therefore, turned entirely upon the point of legitimacy. Indeed, that is the only criterion as to all rights which can be claimed only through the medium of lawful birth, whether these rights be of estates, real or personal, so descendible, or of honours or dignities which can be claimed by such lawful descent alone. Therefore, the sole difference between these cases as good precedents here is, that Shedden's case was tried by judicatories of the Scots law, both in the Court of Session and in the House of Lords: That of Bowes was decided by the House of Peers, as a judicatory neither of the English nor of the Scots law, but common to both, and purely British.

Here again, in this defender's case, the sole circumstance of any relevancy which distinguishes it from those of Shedden and of Mr Bowes is, that Scotland was the place of the marriage of this defender's parents. But by the evidence in the defender's own proof, of Mr Robinson, the agent of his father at the time of that marriage, and now the defender's own agent, and by the depositions of the other witnesses examined, it is not proved that his parents had been in Scotland before they were married, even long enough to found jurisdiction by residence of forty days. From this proof it appears, on the contrary, that 'two or three weeks' was the utmost length of time their visit to this country, on that occasion, had occupied before the date of their marriage. Unquestionably, too, it appears, from the same evidence, that they had come here from their domicile in England; and to that country, as their fixed and permanent home, they

returned after this visit. Even their return to England, as their home, posterior to the marriage, is material; for it clearly shews, that no change of domicile was either then made, or intended by them. On the contrary, (according to the language of the law), while in Scotland *peregrinari videntur*. Indeed, no allegation even of any such change has ever been made. It is likewise evident, that the defender's case, in point of fact, must close at the date of his parents' marriage. This was, therefore, a marriage of parties domiciled in England; and, although regularly celebrated here, it is not less certain that it was celebrated without any change as to the English domicile of the parties in the actual circumstances of this case, than this fact would have been certain if they had come no further than Grctna Green, and had returned instantly after making any valid declaration of mutual consent to marriage there before witnesses.

Indeed, according to this view of the matter, if the defender's plea is good, all English parents who may stand in the same circumstances as the defender's father and mother did before his last marriage, would have only to enter Scotland when they are about to marry, in order to bestow all rights of legitimacy on their natural children previously born, but affected by no mid-impediment. But the question is, whether their natural children ought, in consequence of such marriage, to be afterwards recognized as legitimate either in England or in Scotland? Now, towards the ascertainment of the principles by which it must be decided, it seems to be of some importance to keep the circumstance in view, that intestate personal succession can only descend to natural children through the medium of legitimacy; and, confessedly, it is governed by the law of the domicile;—therefore, if the law of England regards its own rule, and this defender's father had died intestate, the defender could not have inherited any part of his father's personal estate in England, which appears, from the settlement and will produced by the defender in this action, to have been large. If, again, the opposite rule of the Scots law were to be followed in Scotland, then, upon the same hypothesis of intestacy, the defender would have succeeded *ab intestato* both to all his father's heritable estate, and also to his personal property in Scotland. But that deed of settlement further shews, that the defender's father had lawful daughters of a former marriage, and married in England. Supposing their father to have died intestate, would his second marriage to the defender's mother, by legitimating him in Scotland as the heir-male, also cut them off from intestate succession in England through him to real property? Or could that marriage bring the defender to share with them in personal property, descendible through his father, as bequeathed generally by other relations to his lawful children surviving at his death, equally and in capita, according to their number, and not named? Innumerable cases of the same kind may be imagined. But such consequences cannot surely be recognized in Scotland and denied in England, in the multitude of similar cases that may daily occur. Therefore, of necessity, some general principles common to the laws of both countries must be found, to ascertain which of them is to be followed as to the effect of the subsequent marriage of the parents in the legitimation of children previously born to them, wherever that marriage may take place; or, the incongruities and conflicts that will arise, must be most pernicious to the consistency and character of these laws, and altogether endless.

Still, however, the circumstance that the *locus contractus* of his parents' marriage was in Scotland, does distinguish the defender's

case from that of the claimant of the Strathmore Peerage, as well as from the case of Shedden. For, in the first of these other cases, England was the place of the claimant's birth, and also of his parents' marriage, and likewise of their domicile, both at the date of his birth and at the date of their marriage. In all of these respects, too, Shedden was a foreigner to Scotland. Here, on the contrary, the marriage of the defender's parents took place in this country, although their domicile, and his conception and birth, were in England;—and we have the highest authority of the law for holding, that the question, whether, in these circumstances, the law of the place of the child's birth, and of his parents' domicile, or that of the place of their marriage, should govern, is open, and hitherto undecided.

From foreign jurisprudence a single precedent has been found in the practice of France, in the case of Christophe de Conti, dated the 21st of June 1668,\* by the judgment in which, a child born illegitimate in France, of French parents, who afterwards resided in England, was found to be legitimated by the subsequent marriage of his parents in England,—as producing that effect according to the law of France, though contrary to the rule of England. But, in this foreign case, the place of birth was the criterion adopted. Neither does it appear, that the effect of the domicile of the parents in England had been there considered. The import, according to Le Brun,† was, that the marriage was regarded as a contract *juris gentium*, when its effect came to be considered as to a native of France, and succession to property in that kingdom. In the present case, it is the law of the place of the parents' marriage, not that of the child's birth, which favours the legitimacy; and it is here opposed by the law of the place of birth, and of the parents' domicile.

No other situation occurs so similar to that of the laws of England and Scotland since the Union, as the relative position of the *pays coutumiers* and *pays du droit écrit* in France, before the revolution. Perhaps, too, in no other country have the principles which ought to guide, when the municipal laws in different parts of the same realm come into collision, been more successfully investigated than in France.

Pothier, as usual, expresses most clearly the results; and it is only necessary to refer to the 6th, 7th, 8th, 9th, 10th, of the 1st chapter of his '*Introduction aux Coutumes d'Orléans*,' for the following definitions, with the brief explanations with which these are accompanied. 'On appelle,' he says, '*statuts personnels, les dispositions coutumières qui ont pour objet principal de régler l'état des personnes;—les statuts personnels n'ont lieu qu'à l'égard des personnes qui y sont sujettes par le domicile qu'elles ont.*'‡

In Germany, where the independence of the several states, although connected federally and politically in the Empire, may have somewhat diminished the international authority of their several laws which regard personal status, the rule nevertheless appears to have been similar. Muller, in his *Promptuarium Juris, voce Domicilium*, sect. 72. says, '*Actus perfecti ubique valent mutato licet domicilio;—imperfecti et futuri ex legibus novi domicilii æstimantur.*' He also, in the same passage, applies this rule directly to questions of personal

\* Guessiere, *Journal des Audiences*, Nom. 3. p. 283.

† Le Brun, *Traité de Succession*, Ed. 1714. p. 23.

‡ Pothier, *Coutume d'Orléans*, cap. 1. § 1. p. 3.

status, and in particular to that of majority or minority, in cases where the rules of different states are at variance. Still higher authorities might be adduced, and at greater length; but that which has been quoted seems peculiarly apposite to the present case. For here the actus, from which the defender's status of legitimacy or illegitimacy arose, was complete and finished (*perfecti*), beyond all doubt, in the English domicile.

Beyer, in the continuation of the same work, V. Statutum, sect. 10. after mentioning that there are three kinds, namely, real, personal, and mixed, observes in particular as to the second,—‘*Personalia quæ se etiam extendunt extra territorium, adeoque secundum D. D. comitari dicuntur personam ubique locorum ut tamen respiciant subditos, non exertos, aut peregrinos, qui ab alieno territorio nullam qualitatem accipiunt.*’

According to this maxim, the minor defender has carried with him into Scotland the status of illegitimacy impressed upon him by the law of his parents' domicile, which determined the construction of all the acts by which his status can be affected, and which was likewise that which must become his own domicile of origin, as derived from his parents, when he shall attain the age of majority; although instead of it he may then acquire a new and different domicile for himself, at his own choice, and by his own acts.

Without pursuing the inquiry as to the rules in other systems of jurisprudence from which the *jus gentium* upon this head may be inferred, it seems to me at least abundantly clear, that the law of the domicile, if adopted, would prevent all conflict in cases of personal status: Because, from the birth to the death of every individual, it would furnish the criterion by which the rule of decision must be chosen, without derogating from the independence or sovereignty of the law of any country in which a question of this description may arise,—a consequence which perhaps can only be avoided by adhering to this common principle as one of universal obligation.

Upon the whole, then, is not the present case of the defender, when considered, as it must be, in a strictly legal view, just the same as that of any other native of England born there illegitimate of English parents, who maintains that the status of legitimacy has been obtained for him by the single and solitary circumstance that the marriage of his parents took place within the bounds of this country? From the deduction which has been stated, and which at least has been examined with much anxiety, and followed out with no slight degree of reluctance, it seems to be impossible to draw any other conclusion. But if this be the just inference, the sovereignty of the Scots law, within the bounds of its own jurisdiction, cannot be impeached by supposing that its principles are liberal and correct. The effects of the decision which that law requires to be given, upon the interests of morality, are matter for the consideration of the Legislature, not of any Court of Justice. And without entering upon these at all, if an opinion must, according to the principles of this law, be formed against the defender's legitimacy, it is consolatory to think, that the more extensive consequences of these principles are perhaps not generally adverse to the preservation of good order in society.

The conclusion to which I am thus compelled to come, I would express by an interlocutor in these terms:—‘Having considered the memorials for the parties; and having resumed consideration of the revised condescendence for the pursuer, and answers thereto, as also the proof adduced, and productions for the defenders, and whole



‘process; and it is admitted, that the late Alexander Ross, the defender’s father, was by birth a Scotstman, and succeeded to estates in Scotland, but that he went in early life to London, and settled there in business as an army-agent: Find it averred, and not denied, that his residence was in London or its neighbourhood for a period of about fifty years, from the time of his first going to reside till his death in the year 1820, although it is at the same time admitted that he paid occasional visits to Scotland for different purposes, such as voting as a freeholder at elections, letting leases of his property, amusement, or seeing his friends: Find it averred by the defenders, and not denied, that he also visited his estate in Scotland after his marriage, and remained there for the space of two months: Find, in these circumstances, that the late Alexander Ross must be held to have been domiciled in England from the time of his first going to reside there till his death: Further, find it averred, and not denied, that Elizabeth Woodman, the mother of the defender, is a native of England, and no change of her domicile from that country is alleged: Find it proved, that the defender was born on the 6th of February 1811, in Brook Street, New Road, London: Find it also proved, that the said Alexander Ross and the said Elizabeth Woodman were regularly married at Leith, in Scotland, on the 10th of June 1815. On the facts of the case, In respect that the defender was born in England, and that his parents, both at the period of his birth and at the date of their marriage in Scotland, were domiciled in England, by the law of which country he is held to be illegitimate; therefore find, that the defender is not entitled to have the benefit of legitimization per subsequens matrimonium extended to him, in the peculiar circumstances of his case; and find, decern, and declare, in terms of the second conclusion of the libel.’

As it would not fall within the scope of such an interlocutor as this, directly to notice the chief plea of the defender’s argument, as hitherto maintained, to prevent misconception, which might otherwise arise, that this plea had not been duly weighed, I would also propose to add this note:—‘It was maintained, in the memorial for the defender, that, according to the principle of the decisions of the Superior Tribunal in the English divorce cases, this Court was bound to decide in favour of the legitimacy: But, after the fullest deliberation, with the most anxious desire to manifest all the deference which is imperatively incumbent on them in regard to the decisions of the Supreme Court, the Commissaries were satisfied that no such inference could be warrantably drawn from the decisions referred to, and that these were never intended, nor could be considered, as precedents to regulate such a case as the present, which appears to them to be of a nature essentially different.’

**MR COMMISSARY ROSS.**—The present case is a very important one, and attended with considerable difficulty. I have given to it all the attention in my power; but, from the length of time already occupied by the opinions already delivered, I shall merely state the result I have come to, without entering into any detail of the grounds on which my opinion is formed.

The result of the consideration I have given to the case is the same with my brother next me, (Mr Commissary Tod), and generally upon the same grounds. What might be the decision in a case of English parties, having no connexion with Scotland whatever, coming here and taking advantage of our law for the purpose of legitimating their

children previously born in England, by the law of which they could not be legitimated, I am not called upon, nor am prepared, to say. I am bound only to look to the case before me, in which a strong connexion with Scotland must be held to be established. And looking to the present case only, and viewing it in all its facts and circumstances, I hold, that no sufficient grounds have been alleged by the pursuer for denying to the defender the application in his favour of the law of *legitimation per subsequens matrimonium*, as recognized by the law of Scotland. I consider the defender to be within the legitimating influence of our law, and that he must therefore be assailed from the second conclusion of the pursuer's libel.

MR COMMISSARY GORDON.—This is a most important case. But after the long opinions which have been delivered, I should be sorry to take up the time of the Court in going over the whole of my notes. My views coincide in some respects with the opinion of my brother on my left hand, (Mr Commissary Fergusson); and it appears to me, on the facts of this case, that the interlocutor that was read by him is the one which should be pronounced, though I am aware the decision goes the other way, as, when the Court are equally divided, the judgment goes in favour of the defender.

I shall shortly state my views. The points to which the attention of the Court has been called are, domicile, and *legitimation per subsequens matrimonium*.

There is certainly great difficulty to the right determination of domicile, in questions of status, from the different decisions that have been given in the Courts of Great Britain on this point. On the most careful consideration of the views entertained regarding domicile in the divorce cases of Edmonstone and Tewah, and Levot, and Forbes, and Rowland, and of Pye, in the Court of Session, I do not think that they apply to this case. But if these principles did apply, there can be no doubt that this Court has no alternative but to apply the law, with regard to domicile, as settled in these divorce cases, which it has uniformly done in all subsequent cases of English divorces. It appears to me clear, that the defender having been born in England a bastard, and having resided for four years thereafter in England, his domicile during his minority was fixed by his mother's residence there, and his own birth there. With respect to domicile, it appears to me that the cases of *Ommaney v. Bingham*, decided in the House of Lords 18th March 1796; *Bempde v. Johnstone*, in the Court of Chancery, 12th June 1795, (Vesey, p. 202. vol. iii.); *Somerville v. Lord Somerville*, decided by Sir William Grant in the Rolls-Court in 1801; and Lord Chancellor Eldon's opinion in *Tovey and Lindsay*—are decisive of the domicile of Alexander Ross, the reputed father of the defender; and, applying thereto the facts of this case, I consider that the father of this defender must be held to be domiciled in England. To these I may add the principles laid down in the Consistory of London, 29th July 1752, by Sir Edward Simpson, (Haggard's Reports, vol. ii. p. 405.), 'That a minor son is domiciled where his father lived until he comes of age,' &c.; which principles were recognized by Sir William Scott in the case of *Middleton v. Jamieson*, 21st November 1802. (p. 446.)

The domicile of Elizabeth Woodman, before her marriage, was indisputably English; and, after her marriage, it must be held to be so, as fixed by her husband's domicile.

By the Roman law, no relation was recognized between an illegitimate child and his reputed father; but between the mother and the

child it was as perfectly acknowledged as in legitimate children. The father had no power to appoint tutors or guardians, neither were the agnates entitled to act as such. The mother communicated to her bastard child her state in society. In Scotland the law is the same; and the settlement of an illegitimate child is fixed by the residence of the mother: In England it is fixed by the place of its birth, *filius nullius*. On every view of these authorities, therefore, I consider the defender's domicile to be unquestionably English, whether he be considered legitimate or illegitimate.

Holding the domicile to be English, we come to the point, Are we entitled, from the subsequent marriage of the defender's father and mother, to apply the Scotch law of legitimation per subsequens matrimonium? It is clear, from all our law authorities, and the uniform decisions, that children born in Scotland previous to the marriage of their parents are legitimated by the subsequent marriage, if there is no mid-impediment. But it does not follow, that this law, which by a fiction holds the marriage to have taken place at the time of the child's being begotten, can be farther extended so as to reach children born out of the territory of Scotland.

This subject has not been much treated of by our institutional writers. Lord Kames, (B. iii. ch. 8. sect. 1.), when treating of the validity of foreign marriages, says,—'According to the doctrine here laid down, a child ought with us to be held legitimate by a subsequent marriage, provided the marriage ceremony was performed in a country where such is the law; because marriage in such a country must import the will of the father to legitimate his bastard children.' But he does not consider it to extend to England, where it is not the law. Mr Hutcheson says, in his Treatise, (vol. i. p. 3.), 'The status of a person must be determined by the law of his domicile.' The oldest decision that I have met with is referred to in the Strathmore case,—a French one, to be seen in the 'Journal des Audiences de Parlement de Paris,'—Henri de Conti. In that case, the child was born in France, where legitimation per subsequens matrimonium is the law. The marriage and domicile of the parents were in England. In it the child was held to be legitimated. The case of Patrick and Shedden, 1st July 1808, is the earliest case in this country. The circumstances of that case have been fully spoken to by my brothers. I hold it to be exactly the same as this case, because I cannot give any weight to the *locus contractus*. In the case of Gordon of Knockesport, (not mentioned by my brothers), the Judges of the Court of Session held the case of Shedden to be a ruling one. In the late case of Strathmore, the same principles appear to have been laid down in the Court of last resort. The Lord Chancellor Eldon, no doubt, expresses himself as not determining any question not then before the House of Lords; but I have not been able to discover any material difference in this case from the case of Shedden and that of Lord Strathmore—and, in the latter case, Lord Redesdale thus expressed himself:—'The law, therefore, that attached to him at his birth, was the law of England.' And again, after holding the French case of Henri de Conti to be strongly in point, his Lordship says,—'My Lords, I do not enter into the question, Whether, if this marriage had been celebrated in Scotland, it might have had the effect of legitimating the child, because I think it is not necessary; but I must say, that I cannot conceive how it could have that effect. In the case of Shedden against Patrick, it was determined that a child, illegitimate in the United States of America, was not capable of inheriting in

‘ Scotland. It has been stated, that that was decided upon the ground that he was born an alien :—Why was he born an alien ? Because the law of America touched him at his birth, and the retrospective effect of the law of Scotland could not alter the character which at his birth attached upon him. My Lords, I apprehend that that is the true ground of the decision. He was an alien, and that character could not be altered by the retrospective character of the law of Scotland. So I apprehend that this child was born illegitimate, according to the law of the country in which he was born, according to the condition of his mother, of whom he was born, and according to the state of his father, who was at the time a person unquestionably domiciled in England.’

Although this case has been brought in a Scotch Court, I hold it to be clear, that we are not entitled to apply our own law to it ; but that we are, on the contrary, bound to apply the law of England, where he and his father and mother were domiciled ;—and I agree in this respect with my brother. But I am further of opinion, that the status of a child is fixed by the law of the country in which he is born ; and that, if born illegitimate in England, he can only be legitimated by the rescript of the Prince. I do not think that the subsequent marriage of Alexander Ross and Elizabeth Woodman in Scotland, can have the effect of legitimating the defender George Ross—and I hold the opinion given by Lord Redesdale, in the case of Strathmore, that ‘ the retrospective effect of the law of Scotland could not alter the character which at his birth attached upon him.’ The will of his parents at that time is to be considered, and not their subsequent will. The law of England, they must have known, or were bound to know, did not admit of legitimation per subsequens matrimonium, and therefore it was then their will that he should be born illegitimate, and that he should have the status or condition which his mother could transmit to him. I am, on the whole, of opinion, that both on the point of domicile, and on the status which attached at his birth, the defender must be held illegitimate.

There is an unfortunate collision betwixt the laws of the two countries—but the two countries can only be considered as different districts of the United Kingdom, and the one state or district can never possess the power to controul or repeal the law of the other district in which the laws are different. I may add, that this principle was laid down by the Court of Session in the case of *Moorcombe v. Maclelland*, 27th June 1801, where it was decided, that ‘ this Court ought not to be made an engine for either eluding the laws of another, or for determining matters foreign to its territory.’

I have thus shortly stated the views I entertain on this important and very difficult case. I am not surprised there should be a difference of opinion among us with regard to it. It is one of the most important cases that has ever occurred in this Court ; and, although I lean to the interlocutor which has been proposed, I do not regret that the decision will be in favour of the defender. Where there is an equal division of the Court, as I have said, the decision is in favour of the defender. An interlocutor, therefore, will be drawn up by my brothers at my right hand, (Mr Commissary Tod and Mr Commissary Ross), and signed next Court-day.

## No. IV.

OPINIONS of the JUDGES in the COURT OF SESSION;  
referred to at p. 290.

**LORD PRESIDENT.**—In considering the very difficult and important question which occurs in this cause, extreme cases may be put, which are very revolting to one's feelings; and therefore it is the more necessary to endeavour to discover some clear principle which will solve the question. On the one hand, if we suppose a Scotsman and Scotswoman, both domiciled in Scotland, to have connexion, in the course of which the woman becomes with child, but is delivered of that child in the course of a temporary jaunt or visit in England, it does seem to be very revolting to say that such child shall not be legitimated by the subsequent marriage of the parents in Scotland. *E contra*—if we suppose an Englishman and woman, both domiciled in England, to have an illicit connexion, the fruit of which is a child born in England, and the parties continue to be domiciled in England for thirty or forty years, during all which time the child is illegitimate, it does seem to be equally revolting to say, that the parents, by stepping across the border, and marrying in Scotland, should thereby legitimate that child. But I think there is a clear principle of the law of Scotland applicable to this case, whatever may be said of the above extreme cases, or of others which may be put.

I hold the facts in this case, as applicable to the status of the parties in other respects, to be clear:—*1mo*, The defender was born and domiciled in England down to the marriage of his parents; *2do*, His mother, his only legal parent, was as certainly a born and domiciled Englishwoman at the date of her child's birth, and at the date of her subsequent marriage; and she has continued to be domiciled in England ever since; *3tio*, As to Alexander Ross, the father of the defender, he was born a Scotsman; and, by inheriting and succeeding to heritable property in Scotland, he became subject to the jurisdiction of its Courts of law, though it required a particular form of citation to bring him into Court. But in every other respect he was a domiciled Englishman. He had resided there, and there only, for forty or fifty years: His visits to Scotland were not frequent, and of very short duration; and it does not appear that he had any establishment of servants in Scotland: He carried on a great business in England. In short, to every effect whatever (unless the present case shall be held to be an exception) he was domiciled in England at the birth of the child,—at his marriage,—and from that time to his death. These are the circumstances of this case, in reference to the personal condition of the three principal parties; and, by the law of the domicile of all of them, the bastardy of the defender was indelible and irreversible.

Now it appears to me that this directly points at a principle of the law of Scotland sufficient to rule this case. For whenever, by the law of Scotland, bastardy is indelibly fixed on a child, the subsequent marriage of the parents does not legitimate it. This is unquestionably the case if the child be born in adultery, whether of the father or mother. I hold it also to be the case, though some lawyers doubt it, if the father or mother have entered into an intermediate marriage with a third person. But as to the first case, of an adulterous bastard, it is quite fixed that such bastardy is indelible and irreversible, and that the subsequent marriage of the parents does not legitimate such

child. Now it appears to me, that, by the *comitas gentium*, we are bound to give the same effect to indelible bastardy by the law of England, that we do to the same state by the law of Scotland. The first question we ask in Scotland is, Was the child born under such circumstances as to be in a capacity to be legitimated per subsequens matrimonium? If the answer be in the negative, then legitimacy will not follow. And I am of opinion, that if the same question be put as to a child born in England, and the answer be also in the negative, (as it must be in the circumstances of this case), that the result ought to be the same.

I have carefully considered all the authorities produced on both sides. Many of them push their argument too far; and many of them are founded on metaphysical subtleties; and none of them, except one, touch this identical case. But there is one which is directly in point, and which is grounded on the principle I have laid down. It is the opinion of Boullenois, who is said to be a French lawyer of eminence, in which country legitimation per subsequens matrimonium is recognized as amply, or I believe even more so, than in Scotland. He says, vol. i. p. 62.—*J'applique, encore, cette décision à un enfant Anglois 'né en Angleterre d'un concubinage, et dont les père et mère Anglois 'seroient venus demeurer en France, et y auroient été mariés sans 's'y être fait naturaliser, parce qu'étant véritablement étrangers, et 'comme tels soumis aux loix d'Angleterre, leur enfant ne peut être, 'suivant ces loix, bâtard en Angleterre de naissance, et être regardé 'comme légitime en France, parce qu'il porte partout l'état et la 'condition, dont il est par les loix de sa nation.'* This is the very case; and it appears to me to be solved on the only principle which will carry us through this case, and even through the extreme cases which I have above supposed.

I cannot lay any stress on the circumstance, that Alexander Ross, the father, was proprietor of a landed estate in Scotland; because the very same question might have occurred in a case of moveable succession, or even as to a landed estate of a third party, to which Alexander Ross and the heirs of his body were substitutes, and the succession to which had not opened till after his death. And I hold it to be quite clear—at least it is my decided opinion—that a different decision could not be given in those cases from what must be given in this.

If this defender be legitimated by the law of Scotland, he must be so to every purpose, and must take every right to which a legitimate child is entitled by our law. He cannot take the estate of his father, and not that of a third party, to which he may be equally heir; and he cannot take a landed estate, and not be equally entitled to moveable property.

**LORD CRINGLETIE.**—I accede to the above, so far as it goes. My own opinion is founded on the reasons in it, and some others in addition and explanation of the above.

It is unnecessary to prefix any statement of the facts out of which this question arises. These will be well known to those to whom the following is offered. On the merits of this case, I have bestowed all the attention the novelty and importance of it certainly deserve; and the following are my ideas:—

We have one point completely fixed by the cases of Sheddin and the Earl of Strathmore, that a man domiciled in England or in America, having an illegitimate child by an English or an American

woman, marrying in either of these countries, and dying domiciled there, does not by such marriage legitimate the child.

The only difference, then, in this case is, that the late Mr Ross, who, being domiciled in England, had an illegitimate son by an Englishwoman domiciled there, came to Scotland, and married the woman there. And, therefore, the only question seems to me to be, whether the place where the marriage was celebrated can make any difference on the rights of the child? I think that jurists have gone too far when they say, that the law of domicile impresses on the subject qualities which are inherent to, and never quit him, in whatever place he may go to. But still it appears to me to be quite clear, that the law of the domicile rules this case.

1. I am of opinion, that the locus originis is a mere circumstance, and has no other effect than to cast the balance where other circumstances are equally weighty. A man born in Scotland going to England, and being domiciled there, derives no right nor privilege whatever from his birth, and vice versa with an Englishman. Of this we have a decided instance in the above-mentioned cases of Shedden and Strathmore, in which it was ruled that a man, domiciled where English law prevails, having natural children by a woman whom he afterwards marries in the same country, cannot thereby legitimate the children. 2. If either of these persons marry in Scotland, or in England, or in France, he derives no right whatever from the locus contractus. The forms of the country where the marriage is celebrated must be observed in order to constitute a marriage, but that is all; when they return home, the law of the domicile will govern all the effects of the marriage. An English couple marrying at Gretna Green, and returning to England, obtain none of the privileges of Scotland because they happen to marry there. On the contrary, suppose a domiciled Scotchman and woman, having natural children, to take a jaunt to England, merely as a trip for pleasure, and to marry there, I cannot for a moment doubt that such marriage would legitimate the children; because it would only call forth, or produce a consequence belonging to the man, and woman, and children, from the law of their domicile, which was dormant, and required only an *actus solemnis* to promulgate and give it birth; and this seems to have been the principle on which the French case of Conti was decided by the French courts. In the same way, imagine that an English man and woman, domiciled in England, and having natural children, come to Scotland, marry there, and return directly to England—I have not a conception, and indeed I have not heard it pleaded, that by such a marriage these persons could legitimate their offspring. From these premises I draw these conclusions:—1<sup>st</sup>, That the locus originis in a question like the present is of no importance; 2<sup>d</sup>, That the place of the marriage is of no importance; and, 3<sup>d</sup>, That it is the law of the domicile that must govern all the consequences arising from marriage; and that the law of the domicile of the mother must regulate the status and privileges of her natural children. Now I consider it to be admitted, that the late Alexander Ross, though born in Scotland, went to England at an early period,—that he became domiciled there,—that he continued to be so during his whole life,—and that he died domiciled there. In that situation, his being born a Scotchman is of no consequence,—his having an estate here is of as little, farther than to constitute jurisdiction of Scotch Courts over him to the extent of the value of that estate; but it did not make him a domiciled Scotchman. His having an estate here did not constitute Scotland as the spot ‘ubi larem,

'penates, rerum ac fortunarum suarum sedem constituit, unde non est discessurus, si nihil avocet; unde cum profectus est, peregrinari videtur, quod si rediit peregrinari jam destitit.'\* I hold this to be the true definition of a domicile. I hold that England was the seat of Mr Ross's fortunes; and that, when he came to Scotland, he was travelling for a certain purpose, 'peregrinari visus est;' and when he returned to England, 'peregrinari destitit.'

But, farther, an idea occurs to me which was not mentioned at the pleading; and it is this, that natural children do not belong to the reputed father, nor do they take their domicile from him. They belong to the mother, whose domicile is theirs, and whose settlement, in case of poverty, is theirs. Now, the defender in this action was born in England, of an Englishwoman domiciled there; and acquiring all his rights and all his disqualifications from her. By the law of England he had no right to be legitimated by the subsequent marriage of his mother to his reputed father; and, consequently, the origin of Mr Ross, or his having an estate in Scotland, is nothing to the purpose in a question of status of the defender, who is English by birth and by domicile; in proof of which it must be conceded, that, if the marriage had taken place in England, it would have had no effect in legitimating the defender. That is a point not to be disputed after the cases of Sheddin and Lord Strathmore, who were both Scotchmen. What difference, then, can it make that the marriage was in Scotland, when the woman and her child brought with them the disqualifications attending on their domicile? The defender asks two things, viz: 1st, That he is to enter Scotland as an Englishman, and to become a Scotchman; 2d, To become a legitimate Scotchman. Put the case that the defender had been born of a French woman domiciled in France, in which case the child would have been a Frenchman; is it possible to allow that the reputed father could have brought the mother to Scotland, and, by marrying her, legitimate the child, to the effect of enabling him to succeed to Scotch-landed property? No; he could not have done so; for although, by the law of France, legitimation per subsequens matrimonium is allowed, yet the stain of alien to Britain would have adhered to the boy from his birth. And, in the same way, though the defender was born a British subject, yet the disqualification to be legitimated, attached to him at his birth, cannot be removed. I think that Lord Redesdale's idea in the case of Sheddin is correct, and equally applies to this one—that the law of England touched the defender at his birth, and the retrospective character of the law of Scotland could not alter his status. I think that it is a decided point, that the defender could not have been legitimated by his reputed father marrying his mother in England; that the place of celebrating a marriage is of no importance whatever in governing the effects of that marriage; and consequently nothing appears to me to be clearer, than that the circumstance of the late Alexander Ross having married in Scotland, can have no other effect than if the marriage had been celebrated in England. We see that legitimation per subsequens matrimonium is part of the law of France. The late Mr Ross might have gone there and married; but would that have any more effect than if he had married in England? I think it would not. The law of legitimation per subsequens matrimonium is certainly part of the law of Scotland; and it is no part of my province to alter

\* Cod. Lib. 7. De Incolis.



it; but, in cases of difficulty, I do not think that an institution encouraging loose morals is entitled to any favour leading to a liberal interpretation.

**LORDS MACKENZIE AND MEDWYN.**—In this case, briefs have been purchased from Chancery, both by the pursuer and the defender, to take up the succession to the estate of Cromarty. But as the pursuer can be entitled to succeed only in case the defender be incapable of succession, as being a bastard, the parties have stopped short to try that question under the present declarator of bastardy at Mrs Rose's instance, in the Commissary Court, which appears the proper form for doing so. The points of law agitated in this case are new, and attended with difficulty, as well as importance. But, on the whole, we are of opinion, that the judgment of the Commissary ought to be sustained, by dismissing the advocacy.

The principal grounds of this opinion we shall endeavour to express briefly, without resuming at length the circumstances of a case in which there is not much dispute regarding the facts, and on which many opinions are to be given.—We think it clear that legitimatio per subsequens matrimonium is a general rule of the law of Scotland,\* and, therefore, that the defender must be held to be legitimised by the marriage of his father and mother, which took place in Scotland, unless sufficient reasons can be assigned why his case shall be taken out of that general rule. We have then to consider the grounds attempted to be maintained to this effect by the pursuer of the declarator of bastardy.

1. It has not, we think, been argued as a reason why legitimatio per subsequens matrimonium should be denied to children conceived in England, that the concubinage and marriage must be taken together as one course of action, constitutive of legitimate filiation, and of which the whole must take place under the law of Scotland. And we do not think this could have been argued with any effect. For such an argument must rest on the idea that the law of Scotland regards concubinage with some favour or toleration more than the law of England does, and holds out, as an inducement to parties for forming such a connexion, the possibility of afterwards legitimatising any issue they may have. But we think this is certainly not the view of the law of Scotland. The law of Scotland regards concubinage as immoral and irreligious, and even criminal, and has no view whatever of favouring or tolerating it. But as this law is unable wholly to prevent concubinage, it allows legitimatio per subsequens matrimonium, with this view, among others, of drawing the parties out of that state. In this respect the law of Scotland is the same, we conceive, with the canon law, from which it appears to have been derived, and similar, indeed, even to the Roman law, in which legitimatio per subsequens matrimonium was originally introduced by Constantine, the first Christian Emperor, as a temporary law applicable to past concubinage only, and to children born before the date of the law only; and in which, even when legitimatio was afterwards extended so as to include every case of concubinage, it was never allowed with any view of favouring or acknowledging concubinage as a legal or semi-legal state. It is the state of marriage, and not of concubinage, that is favoured:—*'Tanta enim est vis matrimonii subsequens,'* says the canon law, *'ut*

\* Balfour, p. 239. Craig, B. ii. tit. 18. sect. 9. Argument in the case of Lord Pittligo, 23d July 1630.

*'de priori delicto inquiri non sinat, et illud omnino tollat et purget.'*<sup>2</sup> Setting this view aside; then, we see no reason why, in order to legitimation per subsequens matrimonium, the conception or birth of the child should be in Scotland, so far as relates to the interest or right of the father or mother. It seems sufficient that they stand in the illegal relation of father and mother of a child born without marriage, and are proper subjects of the law of Scotland, in order that this law may offer them the inducement to change this illegal relation into a legal one per subsequens matrimonium.

2. It is said that the legitimation of bastards in Scotland, per subsequens matrimonium, is founded on, and limited by, a *fictio-juris*, viz. that the parents were actually married at the date of the birth, or rather conception, and that, when the parents were resident in England at the time of the conception and birth, this fiction cannot be admitted. We doubt whether the rule of legitimation per subsequens marriage was substantially founded on any fiction of that kind, or whether it be possible to limit the rule precisely by means of any such fiction. We doubt very much whether such fiction can be admitted to any greater extent than this, that when such circumstances have existed as would infer not only nullity, but even criminality, by the law of Scotland, in a marriage between the parents, if it be supposed to have taken place before the conception of the child, then legitimation is excluded. Thus if, at the conception, either father or mother stood already married to another person, legitimation per subsequens matrimonium is excluded. But we doubt whether any other circumstance, inferring simply incapacity of the parties then to marry, would bar legitimation,—as, for instance, the insanity of one of the parents at the time of conception. Without determining that question, we hold it to be quite plain, that at least the circumstances must be such, that, in case the father and mother had married at the time of conception of the child, the marriage would have been void. Now what circumstance of that kind exists in the present case? The presence of the parties in England surely is not such circumstance. Could they not have married in England, if they pleased, at the time this child was begot? Could they not have come to Scotland, and married at that time as well as after? In the present case, we are not able to see the shadow of difficulty in the application of the fiction, taking it in the utmost force that can be imputed to it.

3. It has been argued, that this mode of legitimation in Scotland is excluded by the unchangeable nature of the personal status of bastardy, which the bastard has acquired by his conception and birth in England, and brings with him into Scotland. It does not appear to us possible to adopt that argument. We do not think that an English bastard coming into Scotland could bring the English law of bastardy with him, any more than an English lawful son coming into Scotland would bring the English law of legitimate filial relation with him,—or an English father and mother, married or unmarried, could bring with them the English law applicable to their respective conditions,—or any more than a Scotch bastard, or lawful child, or Scotch father and mother, going to England, would import with them into England a portion of the Scotch law for the regulation of their own rights. An English bastard coming into Scotland will be a bastard here, because his parents are not married; but his status here must, we think, be that of a Scotch bastard, not of an English one. On

<sup>2</sup> Craig, B. ii. tit. 13. sect. 16.

this point, the decisions in the late divorce cases apply *a fortiori*. For, in these cases, the argument was, that the indissolubility of the English marriage must continue in Scotland, not only because personal status generally continued when the person passed into another country, but, *a fortiori*, because the status of marriage was constituted by express contract, made under the law of England, and specially fixing this indissolubility; and that this status could not be changed in this respect without violation of that contract. Yet this Court unanimously held that argument not to be good. After these decisions, we think it is impossible to receive the maxim, *status personalis, ubique circumferri*, without such qualifications as will entirely exclude it from having any effect in this question.

4. It is said that the parties concerned here were not domiciled in Scotland at the time of the marriage, or after it; and, therefore, the law of Scotland ought not to be held to have affected their rights. Now, if this meant, and consistently with the facts of the case could mean, that the parties had no such connexion with Scotland as made their persons properly subject to its law, we think the reason would be good why their personal status should not be affected by that law. But it is impossible, in this case, to make such a statement consistently with truth. Alexander Ross was a native Scotchman, who had gone to England in order to carry on business there—not in all probability meaning to end his days there—but continued to hold in Scotland a landed estate—continued to visit Scotland occasionally, and to exercise the rights of a Scotch proprietor and citizen; in particular, remaining liable to the jurisdiction of the Scotch Courts; so that, at any time, decrees could have passed against him, and there was no occasion to cite him as a foreigner is cited. When this person came to Scotland, bringing with him his son, and the mother of his son, for the manifest purpose of subjecting himself and them fully to the law of his native land, in order that, under that law, he might marry the mother, and legitimize the son, so that the son might succeed as a Scotch heir to the Scotch landed estate; and when, for this purpose, he did marry the mother, after the regular form of the Scotch law, and acknowledge the son as his lawful heir, and did stay in Scotland for some months,—it does seem to us impossible to hold that he was not a proper subject of the law of Scotland. We cannot comprehend on what grounds he could pretend to say, or any body else to say, that, after all this had happened, this native Scotchman was still to be viewed as a stranger, on whom the law of Scotland ought not to attach,—who was to live here as if he had been a prisoner of war, or had been cast on our shore from a foreign vessel to-day, and was to sail away in another to-morrow. We think he was as much a subject of the law of Scotland, to all intents and purposes, as any man in that kingdom. Then, if he was so, his wife, who came there to marry him, and did there marry him, and there lived with him for some time after her marriage, must also have become a subject of Scotland; and her son, who also came to Scotland with her, and staid there in order to this very effect, must equally have been so. Suppose that, on the day Alexander Ross left Scotland, his affections had changed, and he had disowned this son, and the present defender had brought a declarator of legitimacy against him, could he have pleaded that he was a stranger, on whom the law of Scotland did not attach, and, therefore, that though he had married the mother of his son, this son was not legitimated *per subsequens matrimonium*? Could such a defence have been sustained? It would not, we think, have

been easy to sustain it; and yet, if that could not have been done, the plea of want of domicile can just as little be sustained now: For legitimacy, once existing, cannot be lost. It is said, that if Alexander Ross had died, then his domicile for intestate succession in mobilibus would have been held to have been in England. Perhaps it would. Intestate succession in mobilibus appears to be allowed to be regulated by one law, without division; and so the law of the country with which the defunct was most connected is wholly preferred, however much the defunct may also have been connected with any other country. And that appears to be on the principle, that he, dying intestate, may reasonably be presumed to have contemplated and intended that his moveable (or personal) property should descend by the law with which he was best acquainted, and the law of the country of which he probably considered himself as chiefly an inhabitant and citizen. It may be that, in regard to Alexander Ross, that country was England; and so his moveable succession, in case of intestacy, would have fallen under that law. But this can form no reason for denying that he was a person subject to the law of Scotland, so that, having married there, his marriage should affect him agreeably to that law. It is competent to any, even a native Scotelman, to settle his affairs, so that his principal domicile for intestate moveable succession may be in any foreign country, though he lives one-half of every year in Scotland. But it would be strange indeed to hold, that, during these residences, he was to be considered here as an absolute stranger, not subject at all to the law of Scotland, but encircled with a legal atmosphere of personal status brought with him from abroad.

We need hardly observe, that one topic which has been urged in some cases is entirely inapplicable here, viz. that the actus legitimus was done in Scotland in fraudem of the law of England. Assuredly Alexander Ross had no view of defrauding the law of England. His object evidently was to give right to his son as in Scotland; and there can be no doubt he bona fide intended to do all that the law of Scotland required for that purpose.

**LORD CRAIGIE.**—So far as the Commissaries have decided in this case, in reference to the first branch of the summons, that 'the defender is the son of Alexander Ross and Elizabeth Woodman,' and that 'a marriage between these parties was regularly celebrated in 1813,' they appear to have exercised the jurisdiction committed to them; and the result of these two findings by the general law of Scotland would be, that the defender was the nearest and lawful heir of these parties, if not within the prohibited degrees of kindred according to the law of Scotland, and if nothing had intervened between the birth of the defender and the subsequent marriage, which could prevent such a union.

But, so far as the Commissaries proceed, in reference to the last conclusion of the libel, and to the brieve taken out by the defender for serving himself heir of tailzie and provision in the entailed estate of Cromarty, to inquire, 'whether the defender is incapable of lawful succession, and has no title to any of the civil rights competent to lawful children,' the Commissaries have, in my opinion, exceeded the bounds of the jurisdiction committed to them.

Such a conclusion would have been imperfect and inadequate in a competition for the personal estate or executry of the defender's father, and where each of the parties claims the office of executor qua nearest in kin. Until a confirmation had been obtained, no right would have vested in the successful party. But, in relation to the entailed

estate of Cromarty, or to landed or heritable property situated in Scotland or elsewhere, the Commissaries appear to have no authority. The only question cognizable by them was, bastardy or not? Whether the pursuer, by preparing her summons in this unusual way, expected to derive some aid from the late determinations as to intestate succession in personal property, which is now held to be regulated by the law of the ancestor's permanent domicile at the time of his death, it is not easy to say. But, if she did so, it is only necessary to examine those determinations, to see that they are truly adverse to her claims.

In this view of the case, the proper course would appear to be, to make a remit to the Commissaries, instructing them to dismiss the summons, so far as relates to the point already noticed; and to proceed farther in the cause as shall be thought just. But, if we are in *hoc statu* called upon, and authorized to decide upon the rights and claims of the parties in relation to the lands and property of Cromarty, which at present is the only subject of competition or argument, I am humbly of opinion that the defender ought to prevail.

There is no longer any dispute as to the defender's filiation, nor as to the legality of the marriage between his father and mother, which was not collusive or simulate, but true and regular in all respects, and followed out in every possible way by the acts and deeds of the parties interested, and in all questions of status, so far as relates to the married pair. The question is, whether the defender's right, as the eldest son and heir of his father by the law of Scotland, is to be defeated by the law of England, if (what is not very clearly ascertained) his father had his general residence in England at the time of his death. In some part of the argument, the pursuer laid some stress upon the circumstance that the defender had been born in England; but that seems to have been given up, and rightly—the defender, before the marriage between the parties, being in the eye of law *nullius filius*, and having no interest in their status or domicile, while they had as little in his, except for the purpose of relieving the parochial funds of the expense of his maintenance.

It humbly appears to me, that, in such a case, there can be no just or solid ground of distinction between the authority of the law of England, and that of any other kingdom or country in Europe in which the defender's father or mother might have their residence at any particular period. By the treaty which united the two separate and independent kingdoms of England and Scotland, no such distinction was established, or meant to be established; on the contrary, while the laws respecting the general government and revenues of the United Empire were as much as possible to be assimilated, it was an express condition of the treaty, and from the state of the legislative body as then constituted, it was most just that no alteration should be made on the law of Scotland, even by the Legislature, (and most assuredly not by the Courts of law in either country), in matters of private right, unless for the evident utility of the people in Scotland. We are, therefore, to decide the point at issue as if the two kingdoms were still separate from each other, or as if it had occurred immediately after the accession of James the VI. of Scotland to the English throne; and if at that time the law of the ancestor's domicile, (in the meaning lately affixed to this expression, that is, the domicile of choice, in opposition to those of origin or birth, or that which is attended to in ordinary questions of jurisdiction), would not in the smallest degree affect the succession to his landed estates in Scotland, it ought to have as little influence at the present time.

If the question thus presented to us were to be considered as an international one, and to be governed by those rules which are observed between all or the greater number of civilized and independent nations on the footing of mutual comitas, and from the utility of having one common rule in transactions of a certain description, the result does not appear to be at all doubtful. It will be found, and indeed it was admitted by both parties, that while in all the other governments of Europe, legitimation, by a subsequent marriage, was effectual, if there were no legal disability or mid-impediment, the English alone had rejected it. For this an eminent lawyer and judge (Sir William Blackstone) has suggested many reasons, instead of the true ones, as given by the English Parliament at the time. But this is of no importance, as Courts of justice must be guided by the law as it stands, and without inquiring into the original causes, or even the expediency or justice of it. In these circumstances there might be room for contending, in an English Court of law, (at least in reference to those individuals whose property in general is situated in other kingdoms), that regard should be paid to what is the general law of Europe in such a case. At any rate, it is not easy to perceive a reason why, besides retaining their own opinions or prejudices in regard to the succession of landed property situated in England, the Judges in that country should attempt, or be held as attempting, to extend them to lands situated in another country, or in all other countries, where a different law has been long established.

But in the transmission of landed estates from the dead to the living, as well as with regard to the modes of constitution of land rights, there is no rule of international law or *jus gentium* such as has been already described. Instead of this, it seems to be established in all countries where there is a law of succession regarding land estates, or rights, or burdens affecting such estates, that they are transmitted and constituted according to the law of the country where the lands are locally situated. It is unnecessary to quote authorities on this point. The rule holds even in allodial subjects. But in lands held by feudal tenure, it is a necessary and unavoidable consequence from the nature of the right. As the right of succession in such property was a boon from the superior, it depended at first entirely upon his will, as expressed in the feudal grant. Again, when it came to be generally allowed, and if the course of succession was not provided for in the investiture, it was to be indicated by the law of the country, or *mos regionis*, and most certainly without any regard to the domicile of the vassal, either at the time of his death or at any other period. The will of the vassal, although expressed in direct and positive terms, was not effectual, unless authorized by the superior, and in the forms prescribed by the public law; and least of all was it to be gathered from the law of the place where he might chuse to reside.

In the early feudal ages, individuals held lands in different countries, subject to different superiors; and it was not unusual for the sovereign of one country to be a sub-vassal in another, and without any obligation to reside in any particular place, though all were liable to be called out to attend the superior in the performance of their feudal services. It would have been most extraordinary; therefore, if the vassal's preferring one country to another should entirely govern the course of his succession, in opposition to the general law of the country where the lands were situated. Not more than a century ago, the noble family of Hamilton, besides their Scots estates, held an extensive territory, with the rank of Duke, in France; and it is believed

they also had property in England; but it never was imagined, that the representative of the family at the time, merely by preferring one of these three kingdoms as the place of his general residence, could alter the law of descent, as it was fixed in the other countries.

In a question with regard to the effects of marriage, or of legitimation per subsequens matrimonium, upon intestate succession, it appears to be extremely doubtful how the doctrine of the domicile could be introduced to any extent. In matters entirely dependent on the will of the party, or to regulate the competency of actions in Courts of law, some such rule may be necessary. But where the immediate and permanent interests of parties are involved, and particularly where those interests have become the warranted grounds of action in the Courts of law, it seems quite unreasonable that the domicile of choice, as it is called, that is, the law of the place where the party is at any given time, *animo remanendi*, should have a decisive influence. And it would lead to the most extraordinary and unjust consequences, if the status of a wife, or of her children, were made dependent on a tenure so precarious. By the marriage, if lawful where entered into, the rights of the man and wife are placed beyond recall by their joint will, whether directly or indirectly announced; and the relations and obligations between the parents and the children are, if possible, still less subject to the controul of any one of them. If, on the day after the marriage, a son previously born, and in the possession of large property in Scotland, dies—could there be a doubt of its descending to his brothers and sisters, born, like him, before the marriage, and, failing them, to any children the father might have had by other marriages, and this entirely without regard to the domicile of the father? In the same manner, might not a son or daughter previously born demand in a Court of law, in every country in Europe except England, aliment as a lawful child? And would it be just that a father's removal to England, whether bona fide or fraudulently, should not only disappoint a just claim while the father remained in England, (if such should be the law there), but that it should be rendered ineffectual where the child was acknowledged as a lawful child? In such a case, would it not be competent to attach any lands that might belong to the father in Scotland? or might not arrestment be used jurisdictionis fundandæ gratia so as to attach his personal estate in Scotland, and so render effectual the claim of the child? And if such are the rights and facilities afforded to children so situated during the life of their parents, are their rights of succession, after their parents' death, to be disappointed or evaded by their father's choice of a residence in a place where there is either no form, or an imperfect one, for giving effect to them?\*

A learned Judge (Lord Gillies) put the question, (*quid juris*), If, after the marriage, the husband had remained long enough in Scotland to create a domicile by residence? and the Counsel for the pursuer admitted that it was a doubtful question. But, as it appears to me, this view of the case ought to be extended a good deal farther. If, by the marriage, certain rights vest *ipso jure* in all the parties, can

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\* If, in virtue of the Cromarty entail, the defender had obtained a decree of irritancy or of devolution against his father, and had completed a feudal title, would it be competent to a son by a subsequent marriage, or any remoter substitute, to insist in a reduction of the decree and infestment, after the father's death, on the ground that the father's last domicile, *animo remanendi*, had been in England?

those rights be vacated merely by the husband's removing his person to another country, and the only one in the civilized world where the Courts of law would refuse to interpose? If, in any other matter, a party should enter into an obligation which, though legal where entered into, is ineffectual to produce action in some other country to which he retires, was it ever heard, that the creditor was to be precluded from legal redress or diligence in the country where the contract was entered into, and where the debtor became bound, and might be compelled, in the ordinary course of law, to perform all that was incumbent upon him?

In actions brought in the Courts of law in Scotland, originating in transactions in foreign countries, the rule is, that *actor sequitur forum rei*. In this way, not only an agreement will be sustained as a ground of action in Scotland, though not authenticated according to the *lex loci contractus*, if it is agreeable to the Scots form; but one that is not made according to the forms of the law of Scotland, or which is held to be extinguished by the law of Scotland, is altogether disregarded in our Courts, although it may be agreeable to, and still in force by the law of the place where it was entered into. And as to the constitution or transferring of rights of lands situated in Scotland, while no writing will be sustained here unless authenticated according to the law of Scotland, however formal it may be according to the law of the country where it was entered into; so an instrument executed in England, though ineffectual in point of form there, will be sustained in the same manner as if it had been framed in Scotland.\*

Thus, according to general principles, the present question ought to be determined in the defender's favour; and the late English decision in the case of *Birtwhistle*, so far as I have been able to obtain information, very strongly confirms this conclusion. The father was an Englishman, and had landed property in that country; but his residence for many years had been in Scotland, where he had purchased lands, and where also he had formed a connexion with the plaintiff's mother, whom he afterwards married in *facie ecclesie*. In Scotland he had his permanent residence, but he died in England, when his sister, as his heir by the law of England, took possession of the English property, the plaintiff being allowed, without dispute, to succeed to the Scots estates. In an action of ejectment, however, in the English Courts, a decision was given in the defendant's favour, thereby ascertaining, that, in succession to lands, no regard was paid, ex tunc, to the law of the domicile; and, consequently, where the case is reversed, and the lands in question are situated in Scotland, no regard ought to be paid to the law of England. It seems to be indisputable, that if in England legitimation per subsequens matrimonium is not admitted, even where the marriage had taken place in Scotland, and the parties had their residence in that country; so, with regard to lands in Scotland, where a different law has been established for centuries, the children of such a marriage are entitled to succeed.

It remains to consider the decisions and legal authorities to which reference has been made, as leading to a contrary result.

One class of these decisions relates to intestate succession in personal estate or executry, which, since the determination of Lord Thur-

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\* Journal of the House of Lords, Feb. 13. 1740, *Fullerton v. Kinloch*. Feb. 24. 1826, *Broughton*; (4 S. & D. 496.)



low in 1791,\* has been governed by the law of the ancestor's domicile. It has been contended, that the intestate succession in landed property ought to be regulated in the same manner; but, upon this subject, after what has been already said, it is unnecessary to offer any argument. Indeed, upon looking at the different decisions, it will be seen that the distinction between the two cases has been, at all times, most distinctly marked. In the case of *Hogg against Hogg*, Fac. Coll. June 7. 1791, p. 378. it is expressly admitted, that 'landed property must ever remain subject to the law of the territory.' In the case of *Balfour against Scott*, decided in the House of Lords 11th March 1793, where the question was, whether a person, taking as heir by the law of Scotland, could be required to collate when claiming a share in the personal estate of the ancestor, who had his domicile in England, it was decided in the negative. But by the same rule, if the ancestor had been domiciled in Scotland, the heir could not have taken the moveable effects in England without being liable to collation. And if the ancestor had left nothing but lands situated in Scotland, his succession would have descended, without regard to domicile, according to the law of Scotland.

While on this subject, I may take the liberty of stating, that although, with regard to intestate succession in personal estate, the law must now be considered as fixed, there are individuals who greatly doubt the authority, as well as the expediency, of the rule so established. That it was rested upon international law cannot be asserted, the current of the decisions in Scotland, for a considerable time, having run in an opposite direction: *Morris against Wright*, January 14. 1783. In its consequences it did most directly alter the established law in Scotland, by compelling the Commissaries to confirm as nearest in kin to a person deceased, his father and mother, and the representatives of deceased nearest in kin, who, by the law of Scotland, were excluded from the succession, and who are not, according to our law, nearest of kin to the deceased. In such a case, the interposition of the Legislature appears to have been necessary to justify such a distribution of the personal estate; but it was also necessary, 1st, To give publicity to the establishment of such a rule; 2d, To point some short and simple form which should be effectual throughout the empire, and by which a party might counteract, in whole or in part, the presumption on which the rule is founded, if it should not be agreeable to his will; and, 3d, To define more clearly the nature and extent of the residence which should govern the succession, it being almost impossible in many cases to discover it; e. g. where, from motives of pleasure or profit, a man divides his residence between Scotland and England, or where an individual, after having formed a domicile in one place, has left that place and declared his purpose never to return, but to reside in the place of his nativity or elsewhere.

But however the law may stand as to succession in personal estate, it was never intended in the same manner to regulate the succession in landed property, whether situated in foreign countries or within the ancient kingdom of Scotland, which, in such a question, must be viewed in the same light in which it stood in 1707. Nor could such a decision be given, without violating the conditions of the treaty between the two kingdoms, and at the same time shaking the security of the records respecting landed property in Scotland.

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\* See the words of the judgment of the House of Lords.

Inefficient and delusive these records would be, if the validity of the rights and documents there appearing depended on the *animus remanendi* of the successive proprietors, and upon the state of the law in those countries where they have established their residence, and which, to the Judges in Scotland, as well as to the parties in general, must be altogether unknown.

With regard to the other decisions to which a reference has been made, they do not apply. In the case of Shedden, the parents had been domiciled and naturalized in America, and there they had been married, thus being subjected to the law of England, which, even after the political separation of the two countries, remained in force, unless where expressly recalled. The son, while his parents lived, was a natural son, having no claim as such, while his father and mother, with regard to his property and effects, were similarly situated. And the question truly was, Whether, after the death of his parents, from whom he could take nothing, he was at once to become a lawful child, so as to take lands situated in Scotland, in which he had never been, and where his parents had never formed any matrimonial connexion? On these specialties, as stated by an eminent Counsel in the case of Strathmore, the claim was decided in the House of Lords. Had Shedden's parents come to Scotland, and there entered into the obligations of man and wife, the case, as it appears to me, would have been viewed in a very different light.

Again, in the more recent case of Strathmore, the decision also rested upon special circumstances; and, according to the principles explained in the case of Birtwhistle, it might admit of some doubt, whether the claimant could succeed to an English Peerage, although his parents had been married in Scotland. But as to a British Peerage, and still more as to a Scots Peerage, I should greatly doubt whether the same determination could be given. In the case of a British Peerage, that is, a Peerage created since the Union, there must be a collision between the laws of the two countries before the Union; but why, in such a case, there should be such a decided preference given to the law of England, I cannot readily discover. Particularly when the British Peer takes his title from a place in Scotland—and still more where he at the same time holds a Scots Peerage, to which a reference is made in the patent,—it would deserve consideration, whether, in point of construction, the latter Peerage should not be held to descend to the heirs of the more ancient one. With regard to a Scottish Peerage, the point appears to be clear indeed. Scotland never was a conquered kingdom; it was not annexed to England, but united upon equal terms, each country retaining its private and municipal rights in the fullest extent, if not expressly taken away. An individual then, who in Scotland would have been received as a Scots Peer before the Union, must still be admitted to vote, and to sit in Parliament, if elected one of the sixteen Scots Peers. In the case of one born in Scotland out of wedlock, but legitimated by a subsequent marriage in Scotland, to the effect of taking the landed estate of his family, I cannot see upon what ground his right of succession to a Scottish Peerage could be disputed, because by the law of England, and in the case of an English Peerage, a different rule may prevail.

As to the foreign authorities, they may be dismissed in a few words. In the case of Conti, the marriage had been celebrated in England, and yet the children were held legitimate; while the authority of Boulleu is merely the opinion of an eminent lawyer in a hypothetical case, and that a very special one, from the want of naturalization, in

consequence of which it would appear that Boullenois thought, that, by the law of France, the individual in question, having been born in England, would carry along with him the state and condition in which he stood by the law of England.

Again, in reference to the opinions of the ancient jurists, and the distinction between *statuta personalia* and *realia*, and with regard to personal privileges and disabilities, they either confirm the opinion I have formed, or are altogether inapplicable. The law of legitimation, if it had been introduced by positive statute, would, so far as regarded landed property, be considered as falling under the *statuta realia*. But with us there is no positive law on the subject. The law of legitimation by subsequent marriage is as much part of the common law of Scotland as that of primogeniture,—the succession of males in preference to females, and of full blood to half blood. And to say that it may be disregarded because the last proprietor had his domicile in England at the time of his death, seems to be as unreasonable as if it were proposed that a Scots estate should go to the sovereign, as in Turkey,—or divide equally among all the children, according to the law made in France during the Revolution, because the last proprietor died domiciled there,—or that it should go to the youngest child instead of the eldest, because the ancestor was domiciled in the county of Kent, where that is the rule.

Again, as to the distinction pointed out respecting personal privileges and disabilities, much is to be found in the earlier writers which cannot be reconciled, and which seems to be founded upon no sound principle. It may be true that a privilege strictly personal, such as that of a peerage, cannot be exercised of right except in the territory of the sovereign by whom the dignity is granted; so, if a man is declared, by a sentence in one country, to be infamous, for an act in its own nature not inferring infamy, it will not be attended to in any other country. But the right of legitimacy which follows from marriage, by the law of all the countries in Europe except England, and the colonies now or formerly parts of England, is not a personal privilege in the proper sense of these words. It arises from the general law; it operates not only upon the state of the persons legitimated, but on the rights of their parents and relatives, and for them as well as against them. And as to the disability arising from minority, the period of which is different in different countries, it appears that, as in the case of actions brought in Scotland, a party will be held to be a minor or not according to the rules established in Scotland; so, in services and other proceedings relating to lands or real estates in Scotland, the same rule must be observed, although it may not be a rule in the place where the pursuer resides, or where the ancestor resided. But the inquiry is foreign to the present discussion. The question here truly is, Whether a jury of Scotchmen, and in a Scots Court, ought not to find that the defender, the child of parents who were lawfully married in Scotland, without any restraint in point of propinquity or otherwise, and having no other children, is the nearest and lawful heir of his father in lands situated in Scotland? And to this, I think, there can only be one answer.

**LORD MEADOWBANK.**—Although the parties have not agreed altogether in the statements of the facts which they have respectively averred, I concur, nevertheless, with the Judges in the Court below in being of opinion, that the discrepancy between them is so immate-

rial as to render unnecessary any farther investigation as to the accuracy of either.

Thus, it is either proved, admitted, or not seriously denied, that the defender is the reputed and acknowledged child of Alexander Ross and Elizabeth Woodman; that he was born in England, while his parents were there residing in a state of concubinage; and that neither of them, at the period of his conception or of his birth, were married persons, or within the forbidden degrees, or were under any circumstances whatsoever that could have prevented them from solemnizing a marriage betwixt them according to the rules of the law of Scotland; but that both were domiciled in England, and so situated, that, in the event of either having died intestate, their personal succession would have been regulated by the law of that country—Elizabeth Woodman, on the one hand, not only having her only residence in England, but being a native of that kingdom; while Alexander Ross, on the other, although not a native of England but a native of Scotland, had established his more permanent and usual residence in the former country. In like manner it is proved, that, subsequent to the birth of the defender, these his reputed parents, being at the time subjected to the laws of Scotland, were married in and according to the rules and rites prescribed by the municipal and ecclesiastical laws of this country; that, previous to this marriage, Mr Ross had occasionally visited Scotland—had succeeded to two several estates within this kingdom—had been enrolled as a freeholder in more than one Scotch county; and that he and his wife, having come to Scotland a few weeks before the solemnization of their marriage, continued in it for some time afterwards: that the defender accompanied his parents to Scotland—was with them at the time of their marriage being solemnized—and was, from that period, both within Scotland and England, acknowledged to be their lawful child.

I also concur in the opinion on which the proceedings in the Commissary Court must have been founded, that the parties in this case, having purchased brieves from Chancery to take up the succession to the estate of Cromarty, and it being clear that the pursuers can only be entitled to be preferred in that competition, if the defender, as being a bastard, be incapable of succession, they have proceeded in due and proper form in originating the present proceedings before the Consistorial Court, to try the question of the defender's legitimacy.

The terms of the judgment pronounced are also, in my opinion, correct and proper, and in no respect can be understood as determining any matter incompetent for the consideration of that Court. It has only been declared, that the defender is a legitimate child, and 'capable of lawful succession, and having a title to all the rights competent to a lawful child;' and so determining generally, the Commissaries appear to me not to have exceeded the bounds of the jurisdiction committed to them.

I see no ground, therefore, for disturbing the interlocutor under review, either upon the principle of the proceedings being improperly or irregularly instituted, or of the fact being imperfectly ascertained, or the terms of the judgment being incompetent or excessive. And I have at length arrived at the conclusion, after giving the case that consideration which its novelty and importance required, that it ought also to be adhered to as being well founded in point of law. This opinion is altogether independent of the fact of the defender's father having been born in Scotland, and of his having kept up some connexion with this country during his life. I should have viewed the

case in the same light had Mr Ross been born in England, and had no other connexion with Scotland than that arising, first, from his having possessed and left an heritable estate subject to the jurisdiction of the Courts of this country; and, secondly, from his marriage having been contracted in Scotland, when, as a natural-born subject of the Crown of Great Britain, he was, as living within the territory of Scotland, in every respect as amenable to the peculiar provisions of its laws and institutions, and as capable of acquiring rights and qualifications under them, as he would have been amenable to the laws and customs of England, had he chosen to remain in England, and to have contracted marriage within the boundaries of that division of the empire. In short, my judgment depends on this simple view of the case, that the defender's parents having, as natural-born citizens of Great Britain, been in a capacity at the time of their marriage to subject themselves to the peculiar laws and institutions of Scotland, and to the effects and qualifications thence arising, and having so subjected themselves by coming into this country, rendering themselves amenable to its jurisdictions, and solemnizing their marriage according to its laws, customs, and institutions, did thereby contract all the obligations and consequences which by them are attached to the state of marriage; and that one of these consequences being, that children antecedently procreated of such parents as may have afterwards married, and who were under no disability to marry at the time of their conception and birth, shall be thereby legitimated, it must follow, that the defender is to be recognized as a lawful child, and his rights enforced accordingly.

To this, however, it has been objected,—1<sup>st</sup>, That as, by the law of Scotland, whenever bastardy is indelibly fixed on a child, (as in the case of children born of an adulterous connexion), the subsequent marriage of the parents does not legitimate that child; so the defender, having been born in England of parents living in a state of concubinage, where legitimation per subsequens matrimonium is unknown, his bastardy must be held to be indelible, irreversible, and incapable of being removed by the subsequent marriage of his parents. 2<sup>d</sup>, That the parents of the defender, having a domicile in England, by which their personal succession would in the event of their dying intestate have been distributed, both at the period of their marriage and after it took place, the law of Scotland, in matters connected with that event, cannot be held to have affected their rights, or to have governed the effects resulting from the contract: In other words, that it is to be considered as an English marriage, and dealt with accordingly. Neither of these objections seems to me to be well founded.

Objection I.—In considering the first of them, it is important to keep in view, as a matter incontrovertibly established, that the rule admitting of legitimation per subsequens matrimonium is founded upon the principle, that in all such cases the matrimonial consent, presumptione juris et de jure, took place at the period of the carnal communication of the parents, or conception of the child, which is therefore held to have been the true date of the nuptials. It disregards altogether the period of their declaration or solemnization, which is held and deemed to be nothing else but the mere evidence of a marriage having been contracted between the parties. Upon this ground it is, that, there being no room for the operation of the principle on which the doctrine of legitimation per subsequens matrimonium is founded in the case of children born of an adulterous connexion, such children cannot be legitimated by subsequent marriage of their parents; because, whatever a change of circumstances may have en-

abled them to do afterwards, at the time of the birth they could not have legally intermarried.

It may also be material to keep in view, that the general rule itself, and the exception just stated, prove that the law of Scotland admits evidence of the filiation to the father of children born in concubinage, so as to allow of their being legitimated, equally as it recognizes the fact of their being children of the mother. Indeed, without such proof being admissible, there could be no legitimation per subsequens matrimonium at all. It is quite a mistake, therefore, to suppose, as seems to have been taken for granted, that bastards, in contemplation of law, belong any more to their mother than to their father. The difference is, that, in the one case, the fact of the filiation generally requires no proof—in the other it does; and although, for certain purposes, and for a certain time, the mother is allowed the custody of the child, the burden of maintaining it is imposed upon the father whenever the filiation is established. But from neither the one nor the other does it acquire any public status or right whatsoever.

From these propositions it is to be inferred, that when the law of Scotland is called upon to determine any case of legitimacy per subsequens matrimonium, (the marriage within Scotland being admitted), it requires no investigation in point of fact, excepting in two particulars; *first*, the filiation of the child; and, *secondly*, the condition of the parents at the time of its conception and birth—whether they were then free to have intermarried with each other, or whether they were incapable of forming that connexion. If these are established it must follow, that it cannot require, or even permit, any investigation into circumstances connected with the condition of the child; because that would be inconsistent with the principle on which the rule itself is founded, namely, that the parents were married when the child was conceived, and that it was born in wedlock, and came into the world with all the rights of a lawful and legitimate child. If so, to require an investigation into any thing with respect to its condition, would be manifestly absurd; for its condition must in all such cases be dependent upon that of its father; and although, until the solemnization or declaration of the marriage of the parents, it was reputed a bastard, that reputation was incorrect and contrary to the fact. No doubt the child was apparently a bastard, because there was no external evidence of the marriage of the parents. But, *fictione juris*, the marriage had taken place; and from the hour when that evidence was made manifest by the subsequent marriage, in contemplation of law he was regarded as a legitimate child, with all the rights and privileges belonging to that status.

In this situation, and in a question of this kind, it seems of no importance whatsoever where the child may have been born, provided his parents, at the time of his conception and birth, were natural-born subjects of the Crown, and capable of subjecting themselves to the peculiar institutions of the law of Scotland—could have contracted a marriage—and did afterwards legally declare or solemnize their marriage within its territory. Accordingly I do not find, in any book on the law of Scotland, the slightest authority for giving countenance to the doctrine, that an inquiry can be instituted into the condition or the situation of the child, either at his birth or during his life, or into any thing else but the filiation and the condition of his parents. The capacity of the child to be legitimated never enters into the discussion: It is the capacity of the parents to have intermarried that forms the subject of inquiry. Indeed, I observe it to be expressly laid down in

the notes which I possess of the lectures of one of the highest authorities in the law of Scotland, (Mr Baron Hume), that, if a son born in concubinage shall himself marry, and shall die leaving children before the marriage of his parents, yet, if his parents do afterwards marry, his children will become entitled to all the rights of the lawful descendants of their grandfather, as if their own father had been born in wedlock.\* In that case, however, the son born before the marriage of his parents must have lived and died with the reputation of a bastard, and with that character indelibly and irreversibly, as it so happened, stamped upon him during his whole life. Yet the power of the principle upon which legitimization per subsequens matrimonium is founded is so invincible, as in such a case, it would seem, not even to admit of an inquiry as to whether the apparently indelible bastard was living or dead at the time of the marriage of his reputed parents, but simply whether he was their child, and born at a time when they could lawfully have intermarried.

In the present case, therefore, it humbly appears to me to be of no importance that the defender was born in England, because, if his filiation be admitted, or not seriously denied, or proved, which it is, and there was nothing at the time of his conception and birth to have prevented his parents from legally intermarrying in Scotland, and they did afterwards so intermarry—then, provided there is no principle in the law of nations which could prevent all the consequences of a Scotch marriage from legally attaching to them, no effect would be given to, or inquiry permitted, respecting his apparent condition at the time of, or subsequent to his birth. *Fictione juris*, the law must hold the true date of the marriage of his parents to have been that of his own conception or birth, and not that of its solemnization or declaration. Although the defender was therefore, no doubt, reputed to have been born a bastard, that reputation was false; for his father and mother, on the contrary, as has been since proved by the ceremony performed by the clergyman, were truly at the time of his birth married persons, and he himself was a legitimate son. In short, the defender (to use the expression of the civil law in such a case) *natus erat, et non factus, filius legitimus*.

A case was put, that the defender had been born in France of a Frenchwoman living in concubinage with a domiciled Scotsman; in which case it was said he would have been born a Frenchman and an alien, and that, as no subsequent marriage could have taken off the stain of alienage, neither could it have removed the stain of bastardy. But, upon the grounds already stated, I must be humbly of opinion, that, upon any view of the law, the determination of such a case would have been directly the reverse of that which was assumed. For, in the *first* place, The father is supposed to have been a Scotsman, with his domicile in this country; *2dly*, The child was born under a system of law admitting of legitimization per subsequens matrimonium, and with no indelible stamp of bastardy affixed to him by the law of the place of his birth; *3dly*, The marriage of the parties was contracted in Scotland.

Now, it seems to have been forgotten, that, from the moment of the marriage, the status of the mother merged in that of the Scotch husband, and her stain of alienage was thereby immediately removed. Accordingly it has never been questioned, that a woman so situated is, in the event of her husband's death, entitled to her terce, and to all

\* To the same purpose see Voet, lib. xxv. tit. 7. § 7.

the other rights competent to a native Scotswoman. And so, in the case of Jankowska against Anderson, November 25. 1791, where the tencer was a foreigner who had been married to a native of Scotland, this right was not disputed. The marriage, and the rights arising under it, were therefore, if questioned in the case supposed, to be considered in the same light as if both the parties had been natural-born subjects of Scotland; and it being an inherent qualification of such a marriage, that the children born before it was solemnized or declared became thereby legitimate, and there was no impediment, from the mother at the time of the child's birth being an alien, to the operation of the presumption that the true date of the marriage was that of the conception of the child, I cannot doubt that a child so situated could no more have been regarded as an alien, than if the parents had been actually married in the face of the Church of Scotland, before its birth within the realm of France.

In short, the whole doctrine of the indelibility of the bastardy of the defender, arising from the fact of his birth having been in England, must be rested upon the principle of there having been something at that period existing in the situation of his parents respectively, and as regarding each other, which would effectually have precluded them from contracting a marriage in Scotland, followed by all the rights and consequences of a Scots marriage. For, if there was no such impediment, the defender, in fact, never was a bastard, and therefore never could have that status indelibly impressed upon him.

II. But as it is not alleged that the late Mr Ross and Elizabeth Woodman were situated, either by their being married persons, or within the forbidden degrees, so as to have rendered their inter-marriage in Scotland illegal at the period of the defender's birth; and as it cannot be pretended that their being domiciled in England could have presented a bar to their forming that connexion—it is to be considered, whether there be any solid ground for the second objection stated to the legitimacy of the defender's birth, viz. that, at the time of the declaration or solemnization of their marriage, they, having had such a domicile in England as would have rendered their personal succession liable to distribution under the provisions of that law, were thereby incapacitated from contracting a marriage in Scotland, accompanied with, and drawing after it, those different rights and consequences which, by its principles and policy, are deemed to be inherent in the contract.

But the principles regulating the distribution of personal succession are altogether different from those which apply to questions relating to marriage and the rights flowing from it. In the former cases, the presumed or implied will of the deceased, in the absence of his expressed will, forms the *regula regulans* for determining all such questions; and from its being held to have been his intention that his personal estate should descend according to the rules of that law, with which, from his residence under it, he is supposed to have been best acquainted, that of his domicile is justly fixed upon as the law by which it is to be distributed.

It is obvious, however, that, even if such questions as the present could be determined by the will of the parties, there would, by its application to them, be a strange inversion of the principle on which alone it is made to operate upon cases of intestate succession: For, in the latter, the implied will of the parties is only had recourse to, when legal evidence of the actual will is wanting or defective; but in such cases as that now under consideration, it cannot be alleged



that there is ever any doubt of the parties having, in a manner sufficiently formal and authoritative, declared their will and intention to have been in direct contradiction to that which, by the supposed implication of the *lex domicilii*, the Consistorial Court is required to give that effect to. Thus it is, with all deference, in this case impossible to dispute, that, by their leaving their domicile in England—coming into Scotland—solemnizing their nuptials according to the law of Scotland—and by their afterwards acknowledging the defender as their legitimate child,—his parents as expressly declared their will and intention to have their marriage deemed and taken to be a Scotch marriage, and to have it accompanied and followed by all the obligations, rights, and consequences of that contract, as in a case of personal succession could have been afforded by the most regular and formal testamentary deed.

But indeed the rights consequent upon the matrimonial contract are totally independent of the will or intention of the parties. 'Foreign courts,' it was observed by the Lord Ordinary in the case of Gordon against Pye, 'are in such cases nowise called upon to inquire after that will, or after any municipal law to which it may correspond. They are bound to look to their own law; and it is, with all deference, thought to be in a particular degree contrary to principle, to make that law bend to the dictates of a foreign law in the administration of that department of international jurisprudence which operates directly on public morals and domestic manners.' And it cannot now, after the judgments in that and similar cases, be doubted, that this is the principle which governs the law of Scotland. But if the intention, or presumed intention, of the parties is altogether excluded in such questions, there has been no legal principle shewn upon which the *lex domicilii* should be allowed either to controul or to affect them. The principle of personal disability, arising from the particular law of the domicile, to enter into the contract beyond its territory, is disclaimed. Indeed, the notion of personal disabilities so attaching themselves is clearly and obviously untenable. It no doubt was at one time entertained; but the doctrine has long been allowed to be inconsistent and absurd, and is exploded by the best public jurists. At all events, the decisions of this Court in the cases of Gordon against Pye, and others since determined, have fixed, that such a principle is not admitted into the law of Scotland.

The only ground then relied upon for giving effect, in the present case, to the *lex domicilii* is, that the different obligations of the contract having been intended by the parties to be executed under the law of the place of the fixed and permanent residence, it is by it that its nature and extent must be regulated. But this view, it is obvious, just reverts to the implied intention of the parties (and that, too, in direct opposition to their formally and legally expressed intention) to limit the extent of the contract by that which is to take place after its obligations have been incurred, and those rights, which regard not themselves only, but their issue, fixed beyond the reach of any will of theirs to alter, infringe, or controul them.—Accordingly, there is no book on the law of Scotland which lays it down that such questions are to be determined by the law of the domicile; and it is therefore impossible for me, not only in the absence of all such authority, but in opposition to the principles laid down, after the most solemn consideration, in the cases of divorce brought in this country by parties married in England, and before taken notice of, to rest upon a ground for guiding my judgment, which seems so inapplicable to the nature

of the question, and which would lead to consequences so irreconcilable to justice.

But indeed other cases, besides those just referred to, have occurred, which seem to go a great way in proving that questions of this nature are not regulated by the law of the domicile, either here or in England. Thus, persons in minority cannot, without the consent of their legal guardians, validly contract marriage within England. It is, however, matter of settled law, that if such parties come into Scotland, subject themselves to the law of this country, and contract marriage, such marriages are binding and effectual in England, and all the world over. But I am at a loss to see how such marriages can be acknowledged, without taking along with them all the effects resulting from the law of Scotland, by authority of which they have been entered into, and by the operation of which alone they are held to be binding. For instance, suppose that an English minor, domiciled in England, has a child born in concubinage in Scotland, and thereafter marries in Scotland, retaining his domicile in his native country—on what principle could a Scotch Court refuse to hold that child to be legitimate? Not upon the principle of the child having been born in a state of indelible bastardy, because, being born in Scotland, by the law of its birth, if it carried any thing, it carried along with it the inherent privilege of being capable of legitimization per subsequens matrimonium; and still less upon the principle that the marriage of the parents (considering it as an English marriage, because in England the objects of the contract were to be carried into execution) could not be attended with the effect of rendering it legitimate; for in England there could have been no marriage; and it is impossible to proceed upon a presumption of that having taken place, which never could have taken place. In short, if the law of England had followed the parties, and they had continued subject to that law, upon the principle of their being strangers in Scotland, the result would have been, that the pretended marriage was a nullity altogether. But although the law of their domicile, it not only did not follow them to the effect of preventing, or of affording grounds for dissolving their marriage, but the marriage by it was as valid and effectual as if the parties had been major, and the ceremony performed in England in the face of the Church.

Upon no principle, presumption, or fiction, therefore, could the particular limitations and restrictions of the law of England, as it appears to me, have been appealed to in such a case as that which is here supposed. On the contrary, if it be clear that it could not, in such a case, have affected the marriage itself, it seems impossible to allow it to operate so as to alter the nature of that contract, or to controul its inherent qualifications, which, presumptione juris et de jure, became binding from the moment of the commixtio corporum, and not from the period of the solemnization.

One other illustration may be given of this matter, by putting the case in another point of view.—By the law of Scotland, fornication is a criminal offence, and has been formerly more than once made the ground of criminal prosecution. Now put the case, that an indictment for that offence had been raised against the late Mr Ross and Elizabeth Woodman, who certainly lived for some short time in this country in a state of concubinage, and that after their marriage they had been brought to trial before the Court of Justiciary—can it for a moment be doubted, but that the defence of these parties, founded upon their subsequent marriage, would have been insuperable? and that, if the prosecutor had rested on their domicile as taking off the inherent qua-

lification of the contract, his plea, upon the principles recognized and enforced in the cases of Gordon against Pye, and others of the same description, must have been repelled? \* The Court must have held that the crime had never been committed, because the true date of their nuptials was that when the first carnal communication betwixt them took place. Yet this defence would have rested entirely on the principle of the civil contract having the effect which the defender contends for at present; and it would be a strange anomaly to hold, that this view must have been successful in the criminal court, while, in the civil, it is to be altogether laid aside. This, however, I apprehend, is out of the question; and if the defence of the defender's parents in the case supposed must have been sustained, his, in the present, cannot be allowed to suffer a different fate.

But I am inclined to take still another view of this question. The principle of legitimation per subsequens matrimonium, which is admitted and recognized by the law of Scotland, is likewise admitted and recognized by the Canon law, and (it has not in the pleadings been denied) by the laws of every Christian country in Europe, with the exception of the laws of England, the Legislature of which has thought fit, by a local regulation, made even in contradiction to the rules of their own Church, to restrict within their territories the operation and effect of the matrimonial contract. But marriage is a contract *juris gentium*, to which, by the law of all nations, certain obligations, rights and consequences, are attached; and it would seem that the qualification of this public right now under consideration, may be fairly considered as part of the public law of Europe. Now, although it may be quite competent for England, or for any state, to restrict those obligations, rights, and qualifications, with reference to the contract as entered into within their own territory, I am inclined to be of opinion, that, as personal disabilities do not follow individuals *extra territorium*, foreign courts (and, above all, such a court as the Consistorial Court of this country, the *Curia Christianitatis*) cannot hold that, by some kind of implication, not explained, and contradicted by the fact, such restriction is to controul the obligations, consequences, and qualifications of a contract *juris gentium*, entered into in a territory where no such exception is allowed. If it was, results the most extraordinary and revolting would occur. Thus, in some divisions of Germany, marriages (*ad legem morganaticam*, or *ad salicem*) are allowed to be contracted by certain classes, which have all the effects of the most regular matrimonial contract, except that the parents, by an agreement, are entitled to exclude the children *nascituri* from all right of succession, as legitimate children, at least through their father.† Now put the case, that a Scotsman, having his domicile in any of these countries, is raised or succeeds to a situation where such a privilege would be allowed him—that he marries, and his children *nascituri* are in legal form excluded from the rights of legitimate children—that children are born of the marriage, which is afterwards dissolved by the death of the mother—a second marriage, without any such limitation, is contracted by the father, and a second family is born—thereafter a competition arises betwixt the eldest sons of the two marriages for an estate tailizied upon the heirs-male of the father, and situated in Scotland—I cannot conceive that there could, in such a case, be the slightest doubt that,

\* *Tanta enim est vis matrimonii subsequentis, ut de priori delicto inquiri non sinit, et illud omnino tollat, et purget.*—Craig, B. ii. tit. 13. § 16.

† Willenbergi Select. Jur. Matrimonial. c. vii. xxxi. xxxiii. &c.

in this country, the child of the first marriage would be preferred, on the short ground, that the qualification competent to such marriage must be confined to the territory by which such qualifications are allowed; and that, being contrary to the general principles of law affecting that contract, they could not be recognized in this country to affect the descent of land estate, where they were utterly unknown.

In like manner, in the present case, where it is attempted to limit the effects of marriage contracted in Scotland by the operation of a special enactment in England, and thereby to determine a question of status, on which the rights of succession to an heritable estate in Scotland must depend, it seems to be contrary to sound principle to admit the operation of such a provision, or to allow it to controul the rights arising under a Scots marriage, and to deprive the child of the late Mr Ross of the power of succeeding to him as heir to that property, which, by the law of Scotland, he might be entitled to take up. Thus, too, it is to the same purpose stated by Blackstone, (vol. i. p. 484. and vol. iii. p. 98.), that even if an incestuous marriage is formed, the issue of that marriage in England will enjoy all the rights of lawful children, if it has not been challenged and avoided during the lives of both the parents. Now put the case, that a party having an estate in Scotland forms such a connexion, and, while domiciled in England, marries in Scotland, and dies in England leaving issue—the legitimacy of that issue could not be challenged, it would seem, in England. It will not, however, I presume, be contended, but that in this country, and in such a case, where an incestuous marriage is held to be void and null, their claims to the status and the rights of lawful children would be at once rejected.

In the preceding judgment, I wish to be understood as giving an opinion confined entirely to the present case, where the parents of the defender were natural-born British subjects, capable of being equally affected by the peculiar institutions of Scotland, when living under them, as they would have been by the institutions of England, when subjected to them. I have no occasion to consider what might be the case of foreigners not born within the allegiance of the Crown, and contracting a marriage while merely passing through the country, when, as in the case of two English citizens marrying in France, mentioned by Boullenois, '*y auroient été mariés sans s'y être fait naturaliser, parce qu'étant véritablement étrangers, et comme tels soumis aux loix d'Angleterre.*' Neither do I mean at all to question the soundness of the decisions in the cases of Shedden and Strathmore, both of which, I have understood, every lawyer has held to have been rightly determined. But, in both those cases, the parties were subject to the qualifications and limitations of the law of England, and had contracted their marriages within the territory of England or America (where the law of England prevailed), by which the principle of *legitimation per subsequens matrimonium* is excluded. In these cases, therefore, the status of all parties had been competently fixed within the particular territory in which their marriages were contracted, by a system of law omnipotent within its own boundaries. In particular, the status of the children, as *fili aut filiæ nullius*, had been finally and irreversibly established by the limitations of that system, and thereby all evidence had even been excluded of their filiation to their supposed parents. In those cases, therefore, there was no ground for holding that a new status should be conferred on the children. On the contrary, the grounds on which I have ventured, in this very difficult and important case, to deliver my judgment, necessarily lead to the con-

clusion, that the children in both those cases could not be legitimated. —It perhaps may be proper also to mention, that I can pay no regard to the report of the case of Birtwhistle, determined in the Courts of law in England; because I am quite aware of my own incapacity, as acquainted with the law of Scotland, to fully comprehend the views and principles by which such questions may be regulated in the Courts in Westminster-Hall. I shall only observe, that in that case, as stated in the pleadings of the parties, no Scots lawyer would have doubted for a moment, that the child claiming as the heir, would, in the Courts of this country, have been recognized as a legitimate son; and that I have understood the judgment proceeded, not upon any general principle applicable to the present case, but upon a technical view of a text in Coke, regarding the character of an heir according to the law of England; and that, had the matter in issue regarded personal estate, the decision would have been different. But, with great submission, the present question has nothing to do with the determination of the Courts of law in England, except it be adduced as establishing, by way of precedent, a general principle; and if the case of Birtwhistle, as it appears to me, has determined any general principle at all, it establishes this, that in all such questions no regard is paid, by the Courts in England, to any other law than their own, which refuses to bend to the dictates of a foreign law, even when the question is one *publici iuris*.

Upon the whole, I am humbly of opinion that the judgment of the Commissaries, finding that the defender is, in Scotland at least, entitled to the status and the rights of the legitimate son of the deceased Alexander Ross, ought to be confirmed by dismissing the advocacy.

**LORD GILLIES.**—It appears that the defender's father was a native of Scotland, and his mother a native of England; but these facts seem to me to be of no consequence, as I am humbly of opinion that the *lex originis* of the parents cannot influence the determination of the present question. I am likewise of opinion, that the domicile of the parents at the time of the conception or birth of the child, is of no consequence.

The fact of the defender having been born in England may be of more importance, and shall afterwards be spoken to.

On full consideration it is also my opinion, that it is of no consequence to ascertain whether, at the period of their marriage, the defender's parents were domiciled in Scotland. The domicile of intestate succession, to which I here allude, and to which Counsel in their argument referred, depends not only on the act, but on the intention of the party. It is not enough that he be resident, but he must be resident *animo remanendi* in the country by whose laws his intestate succession is regulated. This often makes the question of domicile a difficult one; but the rule in itself appears to be just, and founded on sound principles. The general principle is, that succession should be regulated by the will and intention of the deceased; and, if he fails to express his will, the circumstance of his residing *animo remanendi* in a particular country, raises a presumption that he wished or intended his succession to be regulated by the laws of that country. Thus, in every case, it is held that succession is regulated by the will (express or presumed) of the deceased. But the intention or will of the party, which is of paramount importance in a question of succession, is of no consequence at all in a question regarding the legitimacy of his children. This must depend on the fact of marriage, to which, no doubt, the consent of the parents is necessary. But, if that consent has been

given, and a marriage has actually taken place, the legal effects of that marriage, quoad the children, cannot be influenced, or at all affected by the will or intention of the parents. The principle, therefore, upon which the domicile of the party is held to be of so much consequence in a question of succession, has no operation in this case; and I humbly think that the judgment to be pronounced in it should not be influenced by the *lex domicilii*, any more than by the *lex originis*.

It appears to me, that the merits of this case may be comprised in the two following questions:—1st, On the one hand, is a child born of unmarried parents in England, absolutely incapable of legitimization? Is the quality of bastardy, so stamped upon it at its birth by the law of the country in which it was born, indelible? or, 2d, On the other hand, can the legal effects of a marriage, duly contracted in Scotland, be affected and defeated in compliance with the laws of other countries, in which the persons may have resided, or been domiciled, prior, or subsequent to the marriage?

In considering these questions, it is not very easy to preserve a separation of the argument; and I shall not attempt to do so in the few observations now to be offered.—That an illegitimate child born in England, is incapable of being legitimated in England by the common law of England, may be true; but that goes a very little way in the present question; nor does it by any means follow from an admission that such is the law of England, that the same child may not be legitimated in another country by the marriage of its parents in Scotland, where legitimization *per subsequens matrimonium* is an acknowledged doctrine of the law.

The proposition which the pursuers maintain, and in my opinion must maintain, in order to prevail in this litigation, viz. that such character of bastardy is indelible, appears at first view rather a startling one—and this impression will not be removed or weakened by attending to the practical consequences to which it may lead. Two persons, natives of, and domiciled in Scotland, but occasionally visiting or residing in England, have a numerous offspring, suppose twelve children, born alternately in Scotland and England, six in each country. The parents finally enter into a marriage in Scotland; and, according to the pursuers' argument, the effect of this marriage is to confer legitimacy on one-half of the family only, while the other half remain bastards. A doctrine can hardly be right, or agreeable to sound principles, which leads to such consequences.

It is not denied, that the legal effect of a marriage in Scotland, is to legitimate all the children previously born of the parties who contract the marriage. As in the Roman law, so by the older writers on the law of Scotland, this doctrine is laid down without qualification, and as subject to no exception. It is true, I believe, that, by the Canon law, it was held that children, born during the subsistence of a prior marriage of either of their parents, could not be so legitimated. This exception seems reasonable, since otherwise the right of the children of the prior marriage might be defeated by the legitimization of the children, older by birth, of the subsequent marriage. There is no decided case, however, by which such an exception is sanctioned, nor is it countenanced by our older writers. But Mr Erskine says, (b. i. tit. 6. sect. 52.) 'The subsequent marriage, by which this sort of legitimization is effected, is, by a fiction of the law, considered to have been contracted when the child legitimated was begotten, and, consequently, no children can be thus legitimated, but those who are pro-

'created of a mother whom the father at the time of the procreation might have lawfully married. If, therefore, either the father or the mother of the child were at that period married to another, such child is incapable of legitimation,' &c. A prior marriage, according to this authority, prevents the operation of the fiction, because it incapacitates the parties from marrying, and renders their marriage legally impossible at the period when, by the fiction, it is held to have taken place. But the parties are not incapacitated from marriage, nor is their marriage at the requisite period rendered impossible, by their residence, and the birth of the child, in England.

It will be observed, that Mr Erskine, in stating and approving of the exception which he mentions to the doctrine of legitimation per subsequens matrimonium, rests his opinion entirely on an inference arising from the legal fiction, that the marriage is held to have been contracted when the child was begotten; whereas I could rather wish that he had rested it on those solid grounds of justice which I have mentioned. Fictions of law seem to have been the invention of an early and rude age. They were resorted to in those ages, in order to accommodate new rules to preconceived notions of law; to reconcile an apparent or an imaginary inconsistency betwixt new regulations, introduced on views of equity and expediency, and the system of law as existing before their introduction.

In such cases, and assuredly as it appears to me in the present case, the legal fiction is not the foundation of the rule. The rule is founded on principles of justice or expediency, and the fiction is resorted to merely to explain and reconcile it to the principles or notions of the lawyers of the time. It may, therefore, be doubted, how far it is reasonable in every case to hold, that the rule is to be controlled or defeated in its operation by arguments derived, not from the principle on which it is founded, but from the legal fiction with which it was at its introduction unnecessarily encumbered: I say unnecessarily, because in later times our laws have no reference to any such fictions. Thus, by the Act 1696 it is declared, that certain deeds granted by a person within a period of sixty days prior to his bankruptcy shall be null. If this law had been one or two centuries older, we should probably have been told, that there was a legal fiction by which the person was held to be bankrupt at the date of the deeds so granted by him; and then there might have been room to maintain, that he was not in a situation in which he could have been made bankrupt at that period, and that, therefore, his deeds could not be set aside.

It is the rule of our law, founded on views—and I think they are not mistaken views—of expediency, that natural children shall be legitimated by the subsequent marriage of their parents. But this appearing to be inconsistent with the previous general doctrine, that children born in wedlock only are legitimate, some of our commentators resorted to a fiction to reconcile the inconsistency, and Mr Erskine mentions this fiction as the ground of the exception which he points out. But the exception, if it be one, as I think it is, which the law would recognize, is an exception founded on manifest principles of justice—justice to the children who may be born of the prior marriage; and it therefore ought to be received, and would be received, independent altogether of the legal fiction from which Mr Erskine derives it. Availing himself of this, and looking at the legal fiction alone, the pursuer maintains that it is to have the effect of controlling the rule, and defeating its operation, in a case to which, but for the

arguments derived from the legal fiction alone, the rule would certainly apply. A child born in Scotland of Scots parents in 1815, will undoubtedly be legitimated by their subsequent marriage. But if the same parents happen for an intermediate period to reside, and to be domiciled in England, and a child is there born to them in 1816, the child, according to the present argument, cannot be legitimated, because, by the law of England, there is no room for the fiction that they were married when the child born in the country was procreated. Such, perhaps, are the consequences that may naturally be expected to follow, from permitting the rules of law to be explained and controlled by arguments derived from fictions, resorted to, when the rules were made, to accommodate them to the notions of law prevalent at the time, and to reconcile men more easily to their introduction.

It is said, that the character of bastardy in England is indelible; but why is it indelible? Because legitimation per subsequens matrimonium has no place in the law of England; and because, such being the law of England, a subsequent marriage in Scotland cannot have the effect of legitimating a child born in England. Now, let the process of reasoning by which this proposition is supported be attended to: It will then appear, that the only ground for denying such effect to the subsequent marriage in Scotland is, that the law of this country is said to be founded, or to proceed, on a fiction which cannot operate extra territorium. Thus, in whatever way the pursuer may shape his argument, it is manifest that the whole of it is to be traced to the legal fiction. His reasoning consists, not in shewing that our law, in its principles, does not apply to this case, but in endeavouring to shew that its application to this case cannot easily be reconciled to a useless fiction, by which, for the reasons formerly mentioned, I humbly presume to doubt whether the law ought at all to be controlled.

But should those general considerations which I have taken the liberty of suggesting be entirely disregarded, a very important point remains for inquiry, namely, whether Mr Erskine, and the other writers whom he has followed, are right in stating, that by the law of Scotland the doctrine of legitimation per subsequens matrimonium really proceeds on the fiction so often mentioned. Now, in this I apprehend they are quite mistaken. The civil law forms in truth the law of Scotland upon this point. But in the civil law no mention is made of the fiction. This was only resorted to at a later period by the canonists, whose authority with us is of a secondary nature. This, then, is not the case of a fiction, coeval with the rule of law, and on which the rule at its introduction was declared to rest. Here the law, as originally promulgated, stood on its own proper principles of justice and expediency; and the question is, whether this law is to be controlled by a fiction, not countenanced by the civil law, in which the rule originated, and which is in truth our law, but introduced at a later period by the canonists?

It is worthy of remark, that the law of France, if I am rightly informed, has no reference to this fiction; but legitimation per subsequens matrimonium has place in the law of France as well as in the law of Scotland. In both countries the doctrine is confessedly derived from the civil law; and, when it appears that the civil law gives no countenance to this fiction, and that it is not received at all into the French law, it does seem unreasonable to maintain, that it is to regulate or controul the whole of our doctrine on the subject.

But admitting Mr Erskine's doctrine, and the grounds on which he rests it, to be perfectly sound and unexceptionable, it must be carried



a great deal farther, and greatly extended indeed, before it can support the pursuer's plea. Mr Erskine puts the case of a marriage subsisting at the time the child is procreated, which made it legally impossible for its parents then to marry, as forming an insurmountable bar to its legitimation by a subsequent marriage. Here there existed no such legal impossibility. It is said, that the parents were resident and domiciled in England at the time of the defender's procreation. There was nothing, however, to prevent them from entering into a lawful marriage in England at that period.

It is an invariable maxim, that no fiction shall extend to work an injury. But, on the other hand, it may be held as a general maxim, that a fiction shall be so far extended as to accomplish its object, and to work out the rule with a view to which it was adopted. From the marriage of the defender's parents in Scotland, there arises a legal fiction that they were married at the time the pursuer was procreated; and, agreeably to this fiction, it appears to me, that their prior marriage must be feigned to have taken place in Scotland also. The fictitious marriage derives its origin from the actual marriage—the one is the creature of the other; and in whatever country the one took place, the scene of the other must be laid in the same country. The actual marriage was a Scottish marriage—the fiction is a Scottish fiction, necessarily consequent on the marriage; and it is therefore in Scotland that we must hold the fictitious marriage to have been celebrated. It is no doubt asserted—and truly asserted—that the defender's parents, in point of fact, were not in Scotland at that period. But *contra fictionem juris non admittitur probatio*. If it be a fiction of law that the parties were married in Scotland, it is of no more importance to prove that they were not in Scotland, than to prove that there was no actual marriage.

On the whole, to return to the questions formerly proposed, I state it as my opinion, in answer to the first, that the character of bastardy is not indelible; and, in answer to the second, that the legal effects of a marriage contracted in Scotland, cannot be affected or defeated in compliance with the laws of any foreign country, in which the parties may have been, or continued to be, domiciled. I proceed mainly on the principle that the *lex loci contractus* must be the governing rule in this case.

**LORD BALGRAY.**—The case of Mr Ross is of importance, and is attended with considerable difficulty. The facts are few, and are but little controverted by the parties.—Mr Alexander Ross was a native Scotsman. By inheritance, he was entitled to heritable property in Scotland; and by settlement he became proprietor of a large estate, upon which he had a residence. Occasionally he came to Scotland to visit his friends, and to exercise the rights of a Scots landed proprietor. His more constant residence was in England, where he carried on, to the day of his death, a very extensive business. In June 1815 Mr Alexander Ross came to Scotland with the mother of the defender, evidently with the avowed purpose of celebrating a regular marriage with her, and of thereby legitimating the defender, born in 1811, according to the law of Scotland. A residence followed of some eight or ten weeks at Cromarty-house, the family mansion. Mr Alexander Ross having died in 1820, the question arose as to the legitimacy of the defender, and his right of succession to the estate of Cromarty. Although the facts be not complicated or numerous, yet they do give rise to such views of law as to occasion considerable perplexity. The

question is of that nature, that it is apprehended it cannot be solved or justice done to the parties by resorting to any one single principle. Several principles of law must, it is thought, be admitted in combination, as elements for the decision of the question.

1. This Court must be guided and directed by the laws and customs of Scotland, where they are acknowledged and admitted, however peculiar they may be. At a very early period 'it was ordained, that all 'and sundrie the king's lieges of the realme live and be governed under the king's laws and statutes of the realme allenarlie, and under 'na particular lawes, nor special privileges, nor be no lawes of other 'countries nor realmes.' 1425, c. 48. and 1503, c. 79.; Stair, b. i. tit. 1. sect. 16. The *comitas gentium* does not authorize the adoption of any other law which is adverse to the usages of the common laws of the realm of Scotland. 2. The question here is in so far a pure question of status; but it has reference, and the claim can only be competent in respect of that reference, to a succession to a landed estate in Scotland; and, of course, the Court is bound to consider the question as in a competition of briefs, and to decide as a Scots Jury, and to find and declare who is the lawful heir to the estate of Cromarty, according to the laws and usages of Scotland. 3. The rights and privileges, which are the adjuncts of heritable property, depend upon the law of the country where it is situated. The peculiarity of constitution of each country mainly depends upon the mode of holding such property, and of its transmission either *inter vivos* or by succession. *Hertius de Collisione Legum*, Sectio 4. sect. 9. 'Quilibet advena in 'percipienda hereditate succedit non 'secundum suæ personæ, sed 'secundum jura terræ Saxonix, etiam cujuscunque terræ sit, sive Bavariæ, Franciæ vel Suevicæ nationis.' 4. Mr Alexander Ross was a native born Scotsman, and, as such, entitled to enjoy all the rights and privileges which the law of Scotland can bestow; and if any peculiarities regarding private rights do exist in that law favourable to Scotsmen, of such no Scotch court of justice can deprive him. That character and that right is perfectly indelible; and certain effects of that birthright, even in these times, must be acknowledged by every Scotch lawyer to exist, and did exist at the hour of his death.—The legitimation per subsequens matrimonium is now part of the undoubted law of Scotland. It is a privilege granted by the laws, of which every Scotsman is entitled to avail himself. Had Mr Ross remained in Scotland after his marriage, no doubt could possibly have been entertained about the matter. The pursuer could have pleaded in vain to a Scots court or Scots jury that the character of bastard, stamped in England on the defender at his birth, was indelible. It has been said that the birth in England, when joined with the circumstance that the parents were then domiciled there, stamps an indelible character of bastardy, and which operates as a medium impedimentum, and prevents the legitimation per subsequens matrimonium. But this is truly a begging of the question. The child is no doubt illegitimate at its birth in England; but so it would have been in Scotland also; and we only make the bastardy indelible by assuming, what is the matter in dispute, that it cannot afterwards be removed by the operation of the law of another country. If this is a just principle of law, then it will necessarily follow, that had Alexander Ross upon his marriage relinquished all connexion with England, settled in Scotland *animo remanendi*, and continued domiciled there to the day of his death, the child could not have been legitimated: In short, that the domicile of

the father does not regulate the status of his family generally, but only his domicile at the moment of birth. This does not appear to be sound law. The case cannot be rested on such a footing.

6. It is always to be kept in view, that marriage by the law of Scotland is nothing but a civil and consensual contract; and, consequently, in certain respects, it is open to those modifications which apply to other common consensual contracts. In Scotland, Scots people living together as husband and wife will constitute a marriage; but the acting in this manner in another country, where such is not the law, will be no evidence of that tacit consent inferring marriage; and in such a case there could thereby be no legitimization per subsequens matrimonium.

7. The domicile of Mr Alexander Ross was no doubt in England. More properly speaking, it was the domicile of his trade or business. From England being the place of domicile, it seems to be clear that his intestate moveable succession must be regulated by that law. His personal rights and moveables are supposed to be there all concentrated; and it is presumed that it was his intention to destine that species of property according to that law. All this is perfectly consonant to reason, and to the now established principles of law relative to moveable and personal property. But the whole of this totally fails in the case of heritage. Presumed intention no longer exists. The acquirer of heritable property must lay his account with subjecting it to the rules and regulations of the country where it lies; and the law of that country, in that respect, cannot alter with the varying residence of the owner.—Under obvious modifications, there appears to be no inconsistency in two or more domiciles, although it may be necessary to fix on one as deciding the moveable succession. There is no inconsistency in one class of heirs taking the moveable succession by one law, and another class taking the heritage by another law. That is to say, it does not necessarily follow that the law of the domicile is to regulate the succession to heritage. It has been argued, that the opinion of Boullenois determines this matter against the defender, vol. i. p. 62. It is conceived that this is rather an authority in the defender's favour. He states the case of English persons having a child in England, born in concubinage, and coming to remain in France, and being there married; but he adds, '*sans s'y être fait naturaliser*;' and of course that qualification makes part of the elements of his opinion; and of course all must agree with him, that these persons were to be held as English people, and subject to their own laws. But it seems necessarily to follow, that if these persons had been naturalized in France, the legitimization would have followed. Now, it may be asked, was not Mr Alexander Ross a Scotsman to every intent and purpose? Did he not come to Scotland for the avowed purpose of celebrating a regular marriage, and with the clear and evident intention of legitimizing his son, the defender, and creating to himself a lawful heir according to the laws and forms of his native country? He had no occasion to be naturalized; and the wife became participant of his rights.

8. In the last place, I humbly think, that if the marriage was a lawful marriage, which no one can dispute, all the legal consequences must follow, and that in every other country. The contrary doctrine seems to be extremely anomalous.—Having due consideration to these principles of law, it would now be necessary and proper to shew their application to the circumstances of the present case; but having had an opportunity of seeing the opinions of Lord Gillies, Lord Mackenzie, and Lord Medwyn, and concurring with what has been stated by their

Lordships, I consider such a deduction to be unnecessary and superfluous.

Upon the whole it appears to me, that this case must be determined by taking into view various principles, and that the whole combined must be taken under consideration; and by so doing, the necessary result appears to be, that the defender ought to be held by the law of Scotland as the lawful heir of the late Alexander Ross; and that the judgment of the Honourable Commissaries is right.

**LORD ELDIN.**—In the declarator of bastardy at the instance of Mrs Rose, and Mr Rose her husband, against George Saunders, the bastard, a minor, and his curators, various proceedings have taken place.

Saunders was born in England, on the 6th February 1811. His mother, Elizabeth Woodman, was a person of disreputable character, who had various illegitimate children to different fathers. For a short time she cohabited with Alexander Ross; but this was some time after the birth of Saunders; and it does not appear that Ross was the father. Ross was a Scotsman by birth, but he had left Scotland and lived in England for fifty years before his death, by which he lost his Scotch domicile. In the month of June 1815, Alexander Ross, with Mrs Woodman and young Saunders, left their place of residence in England, and went to Scotland. It appears that their purpose was to celebrate a marriage in Scotland, and they expected to legitimate young Saunders as the bastard of Mrs Woodman and Alexander Ross. It may be true, that Saunders was begotten on the body of Mrs Woodman; but there is no evidence that he was the son of Alexander Ross. Saunders was one of many bastards begotten on the body of Mrs Woodman; but Ross made no claim to this bastard till several years afterwards, when he found it convenient to pretend that he was the father of the child, although there was no evidence to support his pretension. And nothing could have been more shallow than the grounds for such a pretended legitimation. He was a bastard by the law of England, which reached him both by his father and mother, and completed his bastardy on both sides of the house. It would be in vain to pretend that such a state of bastardy could be removed. Even supposing the parents could marry, and, by that marriage, legitimate the children afterwards born, no legitimation of the bastard already born could take place.

The Scotch marriage would have legitimated all the children afterwards born of that marriage; but it is another question, whether the marriage in Scotland was effectual to legitimate the bastard born in England four or five years before the marriage took place. It does not appear that any thing has been attempted, by which a difficulty so manifest can be counteracted. The question is, whether a notorious bastard, settled and fixed in that state without any remedy that can be suggested, is a person that can be legitimated and relieved from the stain of bastardy? There are no doubt cases in which legitimation *per subsequens matrimonium* is allowed, and the parties are relieved by the lenity of the law. But, on the other hand, the law is, in many cases, enforced with much rigour, and to the effect of fixing the bastardy upon the individual for his life, and without the least hope of remedy.

But farther, it is necessary to attend to the situation of the parents. The mother was an Englishwoman, and a stranger; the assumed father was not supposed a real or true father; and the man, woman, and child,

returned to England after the lapse of a few weeks. It is evident that they had obtained no link or hold of the country, and still less had they obtained a status authorizing them to use the privilege of their marriage one jot beyond the act of living together as man and wife from the time of their marriage, which left the bastardy untouched; and the stain of many years bastardy remained with them both, as an interminable bond and disgrace which nothing could remove. So far is this case from resembling other cases, in which a marriage, though it is celebrated at the distance of twenty years after the birth of a bastard, may yet be legitimated by the circumstances which often occur to give such an advantage, although, in many other cases, no such benefit can be had.

It has been pretended, that the marriage between Ross and Mrs Woodman had the effect to put an end to all the difficulties arising from the circumstances of the case. But this is a very gross error. Ross and Mrs Woodman made a marriage, and they obtained all the legal privileges which belonged to that marriage. But it is a great mistake to suppose, that the parties gained any thing more by their marriage than the privilege of living as man and wife, dated from the period of the marriage, and without any retrospect to events which had previously happened. It would be in vain to say, that George Saunders did not remain a bastard, subject to all the disabilities which necessarily followed his bastardy. Alexander Ross pretended to be the father of the bastard; but who can say that Saunders was the legitimate son of Mr Ross and Mrs Woodman? The bastardy, arising from the previous follies of Mrs Woodman, was altogether indelible.

But this is not the worst that must follow the crimes of Alexander Ross and his wife. There are disabilities in law for such cases, to prevent the parties from forming other connexions. No doubt it may happen, that a long continued bastardy, in Scotland, is removed by the circumstances of a favourable case. For example, if the parents have always been domiciled in Scotland, the children may be legitimated by a Scotch marriage. But the present is a different case. Saunders is exposed to numerous entanglements of the law of England, from which, to all appearance, there are no means to make him free. He is under the necessity of grappling with these difficulties; and, if he cannot get rid of them, the law of Scotland will avail him nothing.

If it should be possible to get rid of these questions, there is another, which it is not so easy to encounter when it occurs. It has been laid down as law, by two decisions of the House of Lords, that a man domiciled in England, or in America, having an illegitimate child by an English or an American woman, does not by marrying the woman legitimate the child. What other hardships may attend his situation may be uncertain. There is no question as to the marriage of a bastard or bastards. The question is, whether Mr Ross and Mrs Woodman were in a capacity to celebrate a legitimacy of their own bastard, or the bastard of Mrs Woodman? It is not easy to say how all these difficulties can be avoided.

It might have been practicable to make a marriage for young Saunders, when he came of age. But this is not the difficulty to be combated. It is easy to make a marriage between two persons, both of whom are at liberty to marry. But it is not so easy to unravel the frauds and fallacies, and the whole of the conduct of Ross and Mrs Woodman, sheltered in a long series of years by every contrivance that occurred to them.

It is evident, that this is a case which depends entirely upon the law

of England: Apparently, the law of Scotland has no concern with it. Mrs Woodman, with her bastard, and Ross, were all of them equally domiciled in England, and were subject to all the laws of that country. Under these circumstances, it is quite in vain to pretend that the parties, or any of them, had power to escape from the evident difficulties that surrounded them, in their attempts to avoid the English law.

**LORD JUSTICE-CLERK.**—It appears to me extremely important, in judging of this case, to observe how it has arisen. In the summons it is set forth that the pursuer was about to claim the estate of Cromarty, when she was opposed by a brieve of service obtained by the defender as lawful son of Alexander Ross, which she denies him to be. The course of procedure adopted by the Commissaries was perfectly regular, and is sustained as far back as Balfour, who, at p. 239. observes:—‘Gif ony persoun, as heir, claims ony heritage fra ane uther, and the defender alledgis that the pursuvar is bastard and not gottin in lauchful marriage, this clame of heritage intented befor the temporal Judge sall ceis and sleip untill the questioun of bastardie be decided befor the spiritual Judge, and quhill it be certainlie knawin quidder the pursuvar is bastard or lauchfullie begottin; for it pertenis not to the temporal Judge to decide in the action and cause of bastardie.’ There is therefore no objection in point of form, and I am authorized to state, that a doubt expressed in Lord Craigie’s opinion as to that has now been removed. The pursuer bottoms her right to insist in the action on her being heir of entail in the Cromarty estate; so that virtually what we have to decide is, a competition as to who is the heir of entail of Cromarty, a Scotch estate. The question, therefore, is to be decided according to the principles of the law of Scotland. It is now finally settled, that the defender is the son of Alexander Ross; and as there is no evidence of any existing impediment to his marriage with Miss Woodman, (as by Miss Woodman being a married woman), we must throw out of view the plea at one time set up, that the defender was not Alexander Ross’s son. The other ground is, that the defender is not legitimated by the marriage of the parents. In judging of this, we are bound to take into view the whole facts of the case, and I hold them to be these:—Alexander Ross was born in Scotland—he inherited a paternal estate there. In 1786 he succeeded as substitute in the entail of the Cromarty estate, and became a freeholder in two counties. From that period he exercised the privileges of a freeholder—attended elections—managed his estate by a factor—and had all along a substantial hold of the estates till the day of his death. In 1777 he married, and had several daughters; and after the death of his wife he formed a connexion with Miss Woodman, by whom he had this son, whom we must hold as from the first acknowledged to be his son. Professedly for the purpose of availing himself of the privilege of the Scotch law, he came to Scotland in 1815 with Miss Woodman and his son, and in three weeks afterwards was publicly and regularly married by the minister of the parish. Shortly thereafter he went to Cromarty, where he introduced her as his wife, and the boy as his son, and then returned to London, where he resided till the day of his death, and where undoubtedly he was domiciled, to the effect of the distribution of his moveable estate. Then, on these facts, can we listen to the objection made to the effect of this marriage? It is necessary to keep in view, that this was not the ordinary case of two persons living in England all their lives, and, having a distant prospect of succession to a Scotch estate, coming to Scotland for

a day to legitimate their children; for we have here the father's constant and close connexion with Scotland; and I am not moved by the cases put, of parties coming to evade the law of England, as this was a fair bona fide proceeding according to the law of Scotland. The distinction is illustrated by the fact, that the widow is now in full possession of her legal rights, without dispute or challenge; so that, in regard to one important consequence, effect has not been denied to this marriage. It is impossible to think that this case is to be determined by inquiring into the origin of the principle of legitimation per subsequens matrimonium, or whether it arises from the adoption of the fiction, that a marriage took place before conception; but even if we adopt the fiction, where is the impossibility that the parents came down to Grétna Green? There is no impossibility in this; and I deny that the fiction cannot apply. Neither is it on the dicta of foreign jurists that we can decide this case. It was admitted at the bar, that they could not push the doctrine of indelibility of status so far as the jurists do, and that it must be received with innumerable qualifications. Take the case of slavery, or the very strong one of English marriages, which may be dissolved in Scotland if there is bona fides and no collusion, although by the English law they are indissoluble except by an Act of the Legislature. I cannot, therefore, go on the doctrine of indelibility; and the case is therefore brought to this, whether the connection of the parents and the birth of the child, having taken place in England, are a bar to subsequent legitimation? I can see no authority for holding that the place of birth has any thing to do with legitimation. I cannot suppose that it has, otherwise our institutional writers would not have overlooked it if there was any such bar. On the contrary, Lord Bankton, at p. 121. lays down the rule generally, without qualification and without reference to the law of England, that marriage legitimates the previously born children of the parents. There are only two cases referred to—those of Shedden and Strathmore. Now, in looking over the case of Shedden, is it possible to say that it is a precedent for this? The marriage there was entirely in America. Shedden was no doubt a Scotchman by birth; but he kept up no connexion with Scotland, and at that time had no property there. It was therefore entirely different from this case, although I entertain no doubt of the propriety of the judgment pronounced in it. In the same way in Strathmore, the father was born in England. He had Scotch estates no doubt, and was a Scotch Peer, and as such attended elections, &c.; but he did not come to Scotland—marry there—and take his wife to Glammis Castle. He married in England, and claimed a British Peerage; and although there had been no qualification by the learned persons who delivered their opinions in the House of Lords in that case, I could not hold it a precedent here; but the very learned person who then presided in that House used words expressly to exclude its being supposed that he decided such a case as the present. I am therefore of opinion that the bill of advocation must be refused.

LORD GLENLEE.—As to the facts, the parties are in a great measure agreed. If the parties had never been out of Scotland, there could be no doubt but that the defender was legitimated. The pursuer, however, rests greatly on this, that foreign jurists lay down the law, that personal status, once imbibed, follows a man wherever he goes. I rather think that this is a mistaken view of their opinions; they only say, that if no actus legitimus intervenes to alter the status, it adheres to the person. It is nowhere said, that if a particular sta-

tus is acquired, which the law of the country says is indelible; it cannot be altered by an act in a country where such status is not indelible. Even Boullenois' opinion, in reference to the case assumed by him, goes on the circumstance of the parties not being naturalized in France, so as to entitle them to the benefit of the French law; and it implies, that, if they were naturalized, the consequences would follow. We know that all the subjects of the united kingdom are naturalized in every part of it, so that this defect cannot apply to the present case. But I think, at any rate, the foreign jurists go too far, as their opinions will not apply to our principle, that a slave cannot touch British ground; and the pursuer suffers by the maxim, that *statuta personalia* do not follow, for she wishes to introduce a rule of English law not known in any other Christian or civilized state. In the case of Shedden no act was done to alter the status; for we must give to marriage the effect of the law of the country where it takes place; and therefore in Shedden's case it was impossible, even in accordance with the opinion of foreign jurists, that legitimation should take place, when that was not the effect of marriage in America. As to the fictitious cases put of English parties coming across the border to marry, with the view of legitimating their children, and immediately returning, I would reserve my opinion till they occur. If parties came here, having no estate, but only coming to get decree of legitimacy, to be effectual in England, I would dismiss the process, although I could not find that the defender was not legitimate. We have, however, nothing to do with that here. The only question is, whether the defender has been legitimated to the effect of succeeding to a Scotch estate? for the pursuer could bring no declarator of bastardy except to that effect; and I have no difficulty in concurring with your Lordship.

LORD PITMILLY.—I cannot bring my mind to detain the Court with delivering an opinion at length; for although in my notes I have followed a different arrangement, yet every thing which occurred to me has been stated in the printed opinions, or those now delivered; and I shall merely say, that I entirely concur with your Lordship and Lord Glenlee.

LORD ALLOWAY.—I stand precisely in the same situation with Lord Pitmilley. I have prepared very full notes; but your Lordship has expressed so well my opinion, that I shall not repeat it.

#### No. V.

SPEECHES of LORD CHANCELLOR ELDON and LORD REDESDALE, in delivering their Opinions in the Committee of Privileges of the House of Lords, on the Claims to the STRATHMORE PEERAGE.—March 1821.

LORD CHANCELLOR.—My Lords, your Lordships at length are called to the duty of expressing your opinion upon this case. Very early after the death of the Earl of Strathmore, who sustained the characters both of a British Peer and of that which, in the discussion before your Lordships, has been called a Scotch Peer, questions arose which rendered it my duty to suggest, that it was desirable



that this case should be presented to your Lordships for decision at as early a period as possible. The testator died seized of very considerable property in England; he made a will and different codicils, which are in evidence before your Lordships, by which he devised certain real estates to his son, or his reputed son, the petitioner, whose case has been heard at your Lordships' bar. Suits were instituted, or a suit was instituted in the Court of Chancery, in which, on his part, he was represented as Earl of Strathmore. Mr Bowes, the brother of the late Earl of Strathmore, the reputed father of the present infant, also presented himself upon the record as Earl of Strathmore; and a difficulty therefore arose, in what manner the Judge of the Court in which I have the honour to preside was to deal with these parties. In point of process, both of them could not be Earl of Strathmore, and I could not, therefore, consistently continue the process directed to either of them as Earl of Strathmore:—and, taking care that that act should not prejudice the interests of the Peer, if the present infant is the peer, there arose out of the will of the late Lord another question which called for decision, namely, what was to be done with respect to guardianship? For the late Lord appointed a guardian, stating him to be his reputed son; and though we are in the habit of taking the representation of a reputed father, such a father cannot, according to our law, appoint guardians. It was necessary, therefore, for me to determine, whether he was legitimate or illegitimate:—if he was legitimate, the appointment of a guardian was a legal appointment—if he was illegitimate, it would be taken only as a recommendation to the Court of that which, if he had been legitimate, the testator would have recommended. My Lords, if this question had turned merely on questions usually arising in that Court, I should have taken to myself to decide them; but, the right of the Peerage being in question, it did appear to me fit to suggest the necessity of applying to a tribunal within whose jurisdiction the determination of such right constitutionally falls; and this induced the application of those arguments, which I think I may take the liberty to represent, with the concurrence of all your Lordships, have on all sides very much distinguished the character, talents, and abilities of the Counsel who had urged them.

My Lords, if I had had to reason from what had been decided in a case of this nature, recollecting what passed in this House in the case of *Shedden v. Patrick*, I might have ventured to say, that, under the circumstances of this case, this child could not be legitimate. My Lords, I still retain that opinion, notwithstanding all I have heard at the bar, and I wish only, for my own sake, to take care that it may not be supposed I have given an opinion on points on which it is not necessary to say any thing. The illegitimacy of this child appears to me to be made out by the circumstances which I shall shortly state;—I mean, the birth of his father in England:—the fact; that his father was not, as his ancestors were, (provided he was legitimate I should call them his ancestors), a mere Scotch Peer, but that he was, as Earl of Strathmore, British:—that he was as Baron Bowes a British Peer:—that the mother was an Englishwoman;—I do not recollect that she had ever been in Scotland at all; if she had ever been in Scotland at all, it escaped my recollection:—that the marriage was in England:—that the domicile of Baron Bowes was principally in England; that her domicile was certainly altogether in England;—and under the circumstances it does appear to me, attending to the principle which this House meant to maintain in *Shedden v. Patrick*, that—without

deciding at all what would be the consequences of a person married in Scotland before the Union, or persons married in Scotland since the Union, or persons removed from Scotland domiciled elsewhere, and going to Scotland, and obtaining a domicile and marrying in Scotland; without determining those points at all, but recollecting the state and condition of these parties, and the fact, that the father was a British Peer, and looking to the effect of the Act of Union—I am bound to tender to your Lordships my humble opinion, I am sorry so to state, but it is my duty so to state, that this child is not a legitimate child. The consequence of that opinion will be, if your Lordships adopt it, that he cannot make out his title. I do not entertain any doubts upon the grounds of decision in this case. If any of your Lordships should entertain doubts upon this subject, we must regularly go into a discussion of the merits of this case; but unless your Lordships do entertain doubts upon the subject, I think it sufficient, after the full discussion your Lordships have heard, to say that that is my opinion.

**LORD REDESDALE.**—My Lords, in stating what occurs to me upon this case, I will trouble your Lordships with very few words. My Lords, I think it is necessary to consider the effects the articles of Union and the subsequent Acts of Parliament, referring to the realms of England and Scotland, at one time distinct, have had upon this question. My Lords, by the articles of Union that distinct Peerage of England and Scotland ceased to exist; there was no such realm as the realm of Scotland or the realm of England—there was thenceforward only the kingdom and the realm of Great Britain; and all persons who were within the two distinct kingdoms before the Union of England and Scotland, and the subjects of these two distinct kingdoms, became henceforth the subjects of the new kingdom of Great Britain. My Lords, by the articles of Union, the persons who were before Peers of the realm of Scotland became Peers of the realm of Great Britain by the express words of one of the articles of Union—the 23d article. My Lords, there is an express distinction between the character of Peer of the realm and Lord of Parliament. A Lord of Parliament has a distinct character—a Peer of the realm is one thing, a Lord of Parliament is another thing. Your Lordships know, that those who are frequently called Spiritual Lords are not Peers too, but are simply Lords of Parliament; and so the sixteen elected Peers of Scotland, as elected Peers, are Lords of Parliament, though capable of being so elected only in consequence of their being Peers of the realm of Great Britain, having been previously to the Union Peers of Scotland.

My Lords, when they became, by the Act of Union, Peers of Great Britain, they claimed a right of inheritance in a dignity appropriated to Scotland, but a dignity in the realm of Great Britain, namely, the dignity of a Peer of Great Britain;—they acquired a new right hereditary throughout the country, and they lost the character, except for the purpose of the election of Peers of the realm of Scotland, which for all other purposes then ceased to exist. My Lords, as Peers of the realm of Great Britain, they must be subject to the laws of Great Britain, and not to the peculiar laws of a particular district; for thenceforward England was not one district and Scotland another district, locally governed by their own particular laws, but both of them subject, for all general purposes, to the general laws of the United Kingdom. If your Lordships will look at the Act of

Union, you will perceive that nothing is stipulated with respect to the continuance of the laws of England; but it is evident, and it has always been conceived, that the law of England was thenceforth to be deemed the general law of the realm of Great Britain—the new created realm of Great Britain—except as qualified by the particular provision with respect to the laws of Scotland contained in the 23d article of the Union.

My Lords, the consequence seems to me, that the rights of the Peers of the kingdom of England before the Union, must be considered as the rights of all the persons who, by the Act of Union, were constituted Peers of Great Britain after the Union, so far as they were to be considered Lords of Parliament; that general right being qualified in respect of those persons who, previous to the Union, were Peers of the realm of Scotland, because, with respect to them, the character of Lords of Parliament was given only to the sixteen Peers elected out of the general body.

By the articles of Union, and by the Acts of the two Parliaments of England and Scotland which confirmed the Union, all the laws of England or Scotland inconsistent with the articles of Union were repealed; and consequently no law of Scotland, no law of England, inconsistent with the articles of Union, had henceforth any force. If therefore the law of Scotland, taken by itself and before the Union, could affect the character of a Peer born or domiciled in Scotland, but who had become by the articles of Union a Peer of Great Britain, I do apprehend that law could have no effect upon his character as a Peer of Great Britain. My Lords, if, therefore, the rights of the Peers of the realm of England were, upon the Union, communicated in this manner, by amalgamating in one body, as one may say, the Peers of Scotland and the Peers of England, as existing before the Union, and making the two Peers of one realm, namely, the realm of Great Britain; and if, as I think, it is evident from the whole frame and texture of the articles of Union, the laws of England were those which were to attach on the United Kingdom, except as they were qualified by particular provisions respecting Scotland, the consequence would be, that any law of Scotland, differing from the law of England prior to the Union, respecting particular succession to the dignity of a Peer of Great Britain, must be inconsistent with the articles of Union; and consequently the Peers of the former realm of Scotland would become Peers of England, and the laws which made them particularly Peers of Scotland would be held to be repealed.

My Lords, with respect to the particular question now before your Lordships, the infant who claims, as son of the late Earl of Strathmore, the dignity of Earl of Strathmore, now a dignity of the Peerage of your Lordships, united in the kingdom of Great Britain and Ireland,—for that is the effect of the subsequent union with Ireland,—stood in this situation: He was born in England, born of a British mother, and of a father of whom I must say, in conformity to what has been decided, particularly in the Marquis of Annandale's case, a father domiciled in England. My Lords, with reference to the fact of his being one of those persons who for certain purposes are called Scotch Peers, (but only for certain purposes so called, being all now Peers of Great Britain), if that course could operate to make any change, consider what would be the effect of it. The Duke of Richmond is Duke of Lennox: is the Duke of Richmond therefore to be considered as a Scotsman on that account, distinct from his character arising from his domicile and his residence in England? A noble

Lord (Verulam), whom I see is a Peer also of the kingdom of Scotland for the purpose of electing one of the sixteen Peers—I do not know what his situation may be with respect to Scotland, but I believe he would be very much surprised if he was to be considered in any respect as a domiciled Scotsman. There are other noble Lords who are certainly in a similar situation; I therefore take it, that the circumstance of his being one of those persons, who, for certain purposes, are still called Peers of Scotland, though really Peers of Great Britain, which is the only realm existing after the Union in the reign of Queen Anne, and now joined and united with the kingdom of Ireland, and forming the United Kingdom of Great Britain and Ireland, that character cannot possibly affect the question, Whether he was or was not domiciled in England? His birth was in England—his residence was in England—and he must be taken to be, to all intents and purposes, a person domiciled in that district of the United Kingdom which is called England. I apprehend, that, if my Lord Strathmore had died intestate, his personal property would have been distributed according to the local law of England, the law of that part of the country; for he certainly was much more to be considered a person domiciled in England, than the late Marquis of Annandale was, whose residence in England was under very particular circumstances. My Lords, the child that was born of Lady Strathmore, as she now is, and whom my Lord Strathmore acknowledges to be his child, was unquestionably born under circumstances which constituted him a person born out of lawful marriage. He was born in England, of an Englishwoman, who never had been before in Scotland, and I understand never since was in Scotland: the law, therefore, that attached to him upon his birth, was the law of England; and if his mother, or his supposed father, had died within a few years after, unquestionably he was an illegitimate child, born in England, subject only to the law of England, and having no character whatever but that which had been derived from his mother. But it is said, that the subsequent marriage of his father shall have the effect, on account of the connexion which that father had with the district of Scotland, of making him the legitimate heir of the dignity of Earl of Strathmore; though, my Lords, if it is to have that effect, it must have the effect of controlling the law of England; it must repeal the law of England for so much; and I apprehend that you cannot construe the provisions in the articles of Union to have any such effect—you cannot construe the provisions in the articles of Union, with respect to the law of Scotland, to extend beyond the local district of Scotland—you cannot construe it to have the effect with reference to a person upon whom, at his birth, the law of England attached, who was a natural-born subject of the realm, only because he was born in England, and who, in that character, was liable in all the consequences arising from the illegitimacy of his birth in England, because his father possessed a Peerage, which is still called, for certain purposes, a Peerage of Scotland; and that, therefore, his state is to be governed by the law of Scotland. I do conceive, that that would be in effect to repeal the law of England, and that there is nothing whatever in the Act of Union which can possibly give such effect to Scotch law. My Lords, I think the case which has been mentioned as decided in France, is strongly in point upon that subject; for on what ground was that French case decided?—The ground on which it was decided was this,—that the child was born in France—born there subject to the laws of France, and that the retrospective effect was consistent with the laws of France—that

he had gained at the instant of his birth the capacity of a child born in France; whereas this child, at his birth, had no such capacity in reference to Scotland—he was born in a country where, according to the law of that country, he was incapable of being a legitimate child. It seems to me, therefore, that if your Lordships were to hold this subsequent marriage of the Earl of Strathmore with the mother of his child to have the effect of legitimating the child, the consequence would be, you would abrogate the law of England, in so far as that is certainly not within the meaning of the articles of Union. My Lords, I do not enter into the question, whether, if this marriage had been celebrated in Scotland, it might have had the effect of legitimating the child, because I think it is not necessary; but I must say, that I cannot conceive how it could have that effect. In the case of *Shedden v. Patrick* it was determined, that a child illegitimate in the United States of America was not capable of inheriting in Scotland. It has been stated, that that was decided on the ground that he was born an alien. Why was he born an alien? Because the law of America touched him at his birth, and the retrospective effect of the law of Scotland could not alter that character which at his birth attached upon him. My Lords, I apprehend that that is the true ground of the decision—he was an alien, and that character could not be altered by the retrospective effect of the law of Scotland; so I apprehend that this child was born illegitimate according to the law of the country in which he was born, according to the condition of his mother of whom he was born, and according to the state of his father, who was at the time a person unquestionably domiciled in England. My Lords, if we were to enter into the consideration of the effect of a subsequent marriage, because it was solemnized in this country, I am afraid we must go a great deal further than I think it necessary to go in this case. The law of Scotland admits an acknowledgment of marriage as equivalent to the actual form of marriage—the ceremony of marriage is not necessary for the purpose, according to the law of Scotland; but I apprehend it never can be allowed, that that sort of acknowledgment, except in Scotland, could have that effect. I presume that unless that acknowledgment was in Scotland, it could not be deemed to have the effect of legitimating a child not born in Scotland, so that under these circumstances he could, by the law of the country in which he was born, become a legitimate subject. The acknowledgment of a marriage, we are told, would in Scotland have a legitimating effect: when or where that marriage was solemnized, in a case of mere acknowledgment, need not be declared; it is sufficient by the law of Scotland simply to declare, that this person, describing her, is the wife of the person who makes that acknowledgment, and that has the effect of giving to the wife, and to the supposed issue, the legal character of a wife and legitimate child, by the retrospective effect which that marriage had. My Lords, I forbear to enter further into that part of the case, because I think it would carry your Lordships much further than it would be necessary to go; and I have not observed, that in the arguments at the Bar that has been at all considered. My Lords, upon the whole, I do conceive the subject that is now in question is an inheritance governed by the law of the United Kingdom, and that the person who is to claim that inheritance must, according to that law, be heir of the person from whom he claims it by descent—that, according to the law of England, taken independently of the law of Scotland, it is impossible that it could be claimed by the person who now appears before your Lordships—that if the law of

Scotland was to be admitted to have the operation, which in this particular case, to which I would wish to confine myself, it is alleged it ought to have, it would operate as a repeal of the law of England—it would be repugnant to the law of England, and therefore is inconsistent with the articles of Union. Upon that ground I am of opinion, that the claimant has no right to the dignity of Earl of Strathmore, and consequently that that dignity does properly belong to Mr Thomas Bowes, the brother of the late Earl of Strathmore.

LORD CHANCELLOR.—I wish it to be distinctly understood, that I do not mean to intimate any opinion to your Lordships, what might have been the law as applicable to this case, if those parties had been married in Scotland: That that case is open to inquiry, investigation, and decision, whenever it arises; and I take leave to make that addition to what I have before said, because I do apprehend, that the succession of Scotch Peers, by which I mean Peers domiciled in Scotland, and ipso facto Scotchmen, is to be regulated by the Scotch law.

The question was put by the chairman, That the petitioner, John Bowes, is not entitled, and has not made out his claim to the titles and dignity of Earl of Strathmore and Kinghorn, Viscount Lyon, &c. and that the petitioner, the Right Honourable Thomas Bowes, has made out his claim to the titles and dignities of Earl of Strathmore and Kinghorn, Viscount Lyon, &c.: Which being put, passed in the affirmative.

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No. VI.

VERDICT AND JUDGMENT of the COURT of KING'S BENCH, and QUESTIONS proposed by the HOUSE of LORDS to the TWELVE JUDGES, in the case Doe on dem. of Birtwhistle v. Vardill,—p. 294.

“THE jurors say, upon their oath, that William Birtwhistle, being seized in his lifetime, in his demesne, of and in one undivided third part, the whole into three equal parts to be divided, of and in the premises in the within declaration contained, on the 12th day of May 1819 died so seized, without leaving any issue of his body: That all the brothers of the said William Birtwhistle have died in the lifetime of the said William, and that they all died unmarried and without issue, save and except Alexander, one of the brothers of the said William, who married and had issue in the manner and at the time particularly herein-after mentioned: That one Mary Purdie was also a person dwelling and remaining in Scotland, domiciled there until the time of his death herein-after mentioned: That the said Alexander Birtwhistle and the said Mary Purdie being so domiciled in Scotland as aforesaid, the said Alexander Birtwhistle did cohabit with the said Mary Purdie, and did beget upon the said Mary Purdie the within named John Birtwhistle; which said John Birtwhistle was the only son of the said Alexander Birtwhistle and of the said Mary Purdie, and was born in Scotland on the 15th day of May in the year of our

Lord 1799: That after the birth of the said John Birtwhistle, that is to say, on the 6th day of May 1805, the said Alexander Birtwhistle and Mary Purdie were married in Scotland according to the laws of Scotland: That, on the 5th day of February in the year of our Lord 1810, the said Alexander Birtwhistle, the father of the said John Birtwhistle, died in Scotland, seized to him and his heirs of divers lands and tenements there situate, leaving the said John Birtwhistle him surviving, who, after the death of his said father, was duly, according to the law of Scotland, served heir to the said lands and tenements of the said Alexander Birtwhistle, and now holds and enjoys the same in his own right; he, the said John Birtwhistle, having from the time of his birth hitherto dwelt and remained in Scotland, and been domiciled there: That if a marriage of the mother of a child with the father of such child takes place in Scotland, such child, born in Scotland before the marriage, is equally legitimate, by the law of Scotland, with children born after the marriage, for the purpose of taking land and every other purpose: That the said John Birtwhistle, on the 6th day of July, in the fifth year of the reign of our said Lord the now King, did demise the said one undivided third part, the whole into three equal parts to be divided, of and in the said several tenements in the declaration within-mentioned particularly described, to the within named John Doe, to hold the same unto the said John Doe and his assigns, from the fourth day of the same month of July, for the term of twenty-one years thence next ensuing; by virtue whereof the said John Doe entered into the said several tenements, with the appurtenances, and became and was possessed thereof for the term aforesaid; and being so possessed thereof, the said Agnes Vardill afterwards, (that is to say) on the sixth day of the same month of July, with force and arms, entered upon the said several tenements so then being in the possession of the said John Doe, and ejected the said John Doe from the same; but whether or not, upon the whole matter aforesaid, by the jurors aforesaid, in form aforesaid found, the said Agnes is guilty of the trespass and ejectment within specified, the jurors aforesaid are altogether ignorant, and thereupon they pray the advice of the Court of our said Lord the King, before the King himself; and if, upon the whole matter aforesaid, it shall seem to the said Court that the said Agnes is guilty of the said trespass and ejectment, then the jurors aforesaid say, that the said Agnes is guilty thereof, in manner and form as the said John Doe hath within thereof complained against her; and in that case they assess the damages of the said John Doe, on occasion of the trespass and ejectment aforesaid, (besides his costs and charges by him about his suit in this behalf expended), to one shilling, and for those costs and charges to forty shillings; but if, upon the whole matter aforesaid, it shall seem to the said Court that the said Agnes is not guilty of the trespass and ejectment aforesaid, then the said jurors, upon their oath aforesaid, say, that the said Agnes is not guilty thereof in manner and form as the said John Doe hath within in pleading alleged."

The case was argued in the Court of King's Bench in Easter Term 1826, when judgment of the Court was given in favour of Vardill, on the ground, that Birtwhistle was not legitimate for the purpose of inheriting land situated in England.

The case was then appealed, and the opinions of the Twelve Judges having been taken, the House thereafter proposed to them the following questions,—

1. If the fact of the legitimacy or illegitimacy of a native of Scotland is at issue in the Courts of law in England, is it or is it not a principle of the law of that country, that, in judging whether he was born in *justis nuptiis*, it withdraws, and leaves that legal question to the exclusive judgment of the law of Scotland,—where his parents are domiciled, where the alleged marriage took place, and where he was born?

2. If, in the judgment of the law of Scotland, a native of that country is born in *justis nuptiis*, does or does not the law of England, from that comity established by international law, hold him to be possessed of every right which an Englishman born in *justis nuptiis* enjoys? And independent of every view of international law, must or must he not, in law, be deemed to enjoy such rights, under the fourth and twenty-fifth articles of the Union betwixt England and Scotland, approved of and confirmed by the parliaments of the two countries; the former of which provides, 'that there be a communication of all rights, privileges and advantages, which do or may belong to the subjects of either kingdom, except where it is otherwise expressly agreed in these articles:' and the latter of which provides, 'that all laws and statutes in either kingdom, so far as they are contrary to or inconsistent with the terms of these articles, or any of them, shall from and after the Union cease and become void, and shall be so declared to be by the respective parliaments of the said kingdoms?'

3. A., a native of Scotland, domiciled in that country, where he possessed a landed property, lived with a female, B., by whom he had two sons, C. and D. Some years after the birth of these children, A. went through a ceremony of marriage with B., by which, according to the law of Scotland, C. and D. undoubtedly became legitimate.

At the death of the father A., C. the eldest son, inherited his estates in Scotland, and some years afterwards purchased freehold estates in England. C. afterwards died intestate, leaving no children. His legitimate brother, D., inherited his estates in Scotland, and was regularly served heir to them. D. also claims the freehold estates in England of which his brother died possessed, on the ground that he is the nearest heir to his brother C. It has been, on the other hand, asserted, that D., though the legitimate brother of C., cannot inherit his English estates; because, though the law of Scotland holds that the ceremony of marriage which took place, is only evidence of that consent which constitutes marriage having been given before the birth of C. and D., and therefore regards them as being born in lawful wedlock, the law of England holds, that *de facto* they were born before the marriage ceremony, and therefore, though it admits their legitimacy, holds that they cannot inherit.

By the law of England, must or must not this question be decided according to the law of Scotland—where these two children were born, where the marriage ceremony took place, and where the parties were domiciled? And if it is to be decided by the law of Scotland, assuming that the law of that country is here accurately stated, does it not follow, that C. and D. being born in *justis nuptiis*, according to the law of that country, D. has a right to inherit the lands in England of which his brother C. died possessed?

4. A., a domiciled Scotsman, possessed of estates in that country, cohabited with B., by whom he had a son, C. Some years after which a marriage ceremony passed betwixt him and B., which, according to the law of that country, furnished evidence of that mutual consent having taken place antecedent to the birth of C. which constitutes marriage, and gave to his son C. the status of a son born in lawful wed-



lock. A., some years after this marriage, retired to England, and acquired a domicile there, where he became possessed of a large personal estate. At the death of A., C. was served heir to the Scotch landed property. Is he or is he not also entitled to the personal estate in England, consisting of leasehold and funded property, of which his father, supposed to be a domiciled Englishman at the time of his death, died possessed?

5. A., an unmarried man, went from England to Scotland, where he acquired landed property, resided, and was domiciled for many years.

Soon after his arrival in that country he formed a connexion with a female, M., with whom he lived, and by whom he had a son, B. Some years after the birth of this child a regular marriage ceremony, according to the forms prescribed by the law of that country, took place betwixt A. and M.

Assuming (as is laid down by all the great authorities who have written on the law of Scotland) that B. in consequence of this ceremony is held to be legitimate, by a presumption or fiction of law that the marriage had taken place betwixt his parents before he was born; or, in other words, assuming that the ceremony of marriage which so took place is by the law of Scotland regarded as evidence, that before the procreation of B. that mutual consent to marry had passed betwixt A. and M. which the law of that country regards as constituting marriage, and that he is therefore held to have been born in *justis nuptiis*, and as such was in truth served heir to the landed property in Scotland in which his father died infest; under such assumption, the learned Judges are requested to say, whether B. is or is not entitled, as the heir of A., to the real estates in England of which A. dying intestate was seised?

6. Is there any case in which, under the law of England, an only son, whose legitimacy is admitted, is nevertheless debarred from inheriting landed property of which his father dying intestate was possessed?

7. If such case or cases exist, the learned Judges are desired to give to this House references to the authorities by whom they are reported, and to state the principles of law on which such judgments proceeded.

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**AGENT AND CLIENT.**—See *Reparation*, 3.

**AGENT AND PRINCIPAL.**—Circumstances under which it was held (affirming the judgment of the Court of Session), that a party receiving money as attorney of another was bound to lay it out at interest within six months thereafter, and was liable in 5 per cent for all money not so laid out; and that he was entitled to a commission of  $2\frac{1}{2}$  per cent on the money received by him.—*BROWN v. BROWN*, March 3, 1830, p. 28.

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**APPROBATE AND REPROBATE.**—A domiciled Scotsman having executed, in Scotland, a deed of settlement conveying to trustees his whole property, including an English estate, which was probative according to the law of Scotland, but defective in point of form as to the conveyance of the English estate;—found (affirming the judgment of the Court of Session), that the heir to the English estate could not take it, and at the same time claim a provision made to him in the trust-deed.—*DUNDAS v. DUNDAS, &c.* Dec. 22, 1830, p. 460.

**ARBITRATION.**—1. Held (affirming the judgment of the Court of Session), that a reference or submission by a landlord and tenant during the currency of a lease, and on the eve of a break, to a third party, as to a deduction of rent, was constituted by a series of letters; that it related to the period of the tenant's possession posterior to the break, and not to the prior years; and therefore, that the decree, which was

confined to the posterior years, was good: And, 2. observed, That even although the reference had embraced both periods, yet, as the tenant was the sole claimant, and decree was given on part of his claim, it was no objection that judgment was not pronounced on the other part; but the case would have been different, if there had been claims on both sides, and judgment given only as to one of the claims.—*MACLELLAN v. MACLEOD*, July 9, 1830, p. 157.

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**BONA OR MALA FIDES.**—1. Circumstances under which (affirming the judgment of the Court of Session) it was found, 1. That a party possessing under a long lease, in violation of an entail, was not entitled to claim meliorations from a succeeding heir of entail; and, 2. That he was liable in violent profits, from the date of the judgment of the Court of Session reducing the lease.—*INNES v. EXECUTORS OF ALEXANDER DUKE OF GORDON*, Nov. 10, 1830, p. 305.

2. Held (affirming the judgment of the Court of Session), that an heir who continued in possession of a farm after the death of the tenant, on a supposed right vested in the heir by the terms of the lease, was not liable in violent profits prior to the judgment of the House of Lords, (reversing that of the Court of Session,) finding that the heir had no right.—*CARNEGIE v. SCOTT*, Dec. 9, 1830, p. 431.

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**BURGH ROYAL.**—1. Circumstances and clauses in titles held (affirming the judgment of the Court of Session), to constitute a burgage tenure, and not a feu. 2. In a grant by burgage-holding, the town-clerk is alone entitled to act as notary; and the sasine must be registered in the books of the burgh. 3. Held (reversing the judgment of the Court of Session), that a clause of thirlage of grana crecentia, having these words adjoined, 'and other stuff and corn they shall happen to grind, seed and horse corn and bear excepted,' does not import a thirlage of invecta et illata.—*DAWSON and MITCHELL v. MAGISTRATES OF GLASGOW*, March 31, 1830, p. 81.

**CAUTIONER.**—1. Where each of A and B, two distressed cautioners, granted to the creditor a bill for one-half of the debt; and each endorsed the bill of the other; and C, interposing as cautioner, put his name as endorser on A's bill, and as joint acceptor on B's; and A retired his bill, but C was obliged to pay B's bill;—Held (affirming the judgment of the Court of Session), that C was entitled to relief against A.—*INGLIS v. WALKER*, March 3, 1830, p. 40.

2. Circumstances in which it was held (reversing the judgment of the Court of Session), that cautioners for a tenant, who had stipulated that the landlord should exercise his right of hypothec before calling on them to fulfil their obligation, were discharged.—*M'TAVISH v. SCOTT, &c.* Dec. 7, 1830, p. 410.

**CHURCH.**—See *Parish*.

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DEATH-BED.—See *Tide to Pursue*, 2.

DEBTOR AND CREDITOR.—See *Appeal*.

DECLINATURE.—See *Process*, 6.

DISCHARGE.—Held (reversing the judgment of the Court of Session), that a discharge 'of all and sundry claims and demands, debts, and 'sums of money indebted and owing,' did not include a right of relief from a cautionary obligation existing prior to the date of the discharge, but on which the cautioner had not then been distressed;—there having been executed unico contextu with the discharge, a disposition in security to the cautioner of whatever sums of money, principal, interest, and expenses, he might advance and pay in consequence of 'any 'cautionary obligations, letter of guarantee, or other such obligations 'granted or that may be granted.'—*M'TAGGART v. JEFFREY*, Nov. 24, 1830, p. 361.

— See *Fraud*.

ENTAIL.—1. Held (reversing the judgment of the Court of Session), that although an entail contain a prohibition against selling, yet, if the irritant and resolute clauses do not apply to sales, the heir in possession is entitled to sell, and is not bound to re-invest the price in other land.—*STEWART v. FULLARTON, &c.* July 16, 1830, p. 196.

— 2. Held (reversing the judgment of the Court of Session), that an entail containing prohibitory and irritant clauses, but no resolute clause against selling, does not create an obligation on the heir selling to re-invest the price in other lands.—*BRUCE v. BRUCE*, July 16, 1830, p. 240.

— 3. Held (reversing the judgment of the Court of Session), that an action of damages by an heir of entail in possession was not competent against the executors of the preceding heir, who possessed under an unrecorded entail containing prohibitive, irritant, and resolute clauses; and who was alleged to have violated the prohibition as to the letting of the lands; and the penalty of the entail was the heir's forfeiture, and nullity of the act, and not pecuniary damages.—*DUKE OF QUEENSBERRY'S EXECUTORS v. MARQUIS OF QUEENSBERRY*, July 16, 1830, p. 254.

— See *Bona or Mala Fides*, 1.

EXCLUSIVE PRIVILEGE.—Held (affirming the judgment of the Court of Session), that the Society of Solicitors before the Sheriff Court of Edinburgh, have no exclusive privilege of practising before the Court of the Sheriff-substitute of Leith.—*SOCIETY OF SOLICITORS v. SMILLIE, &c.* Nov. 24, 1830, p. 370.

EXECUTOR.—Where a party, who had money in bank, executed a will, in which he nominated his son executor, who was partner of a company indebted to the bankers; and the bankers, by authority of the son, transferred the money to his individual account, taking a discharge from him qua executor; and thereafter transferred it to an account in name of the company, whereby the debt due to the bankers was extinguished; and the Court of Session (in a question with a party having a beneficial interest under the will) found the bankers not liable to account,—the House of Lords reversed, and remitted an issue to ascertain whether the bankers were in the knowledge that the money was part of the funds of the defunct, and held by the son qua executor, and subject to the trusts of the will, and that those trusts were not satisfied.—*TAYLOR v. SIR W. FORBES and Co., &c.* Dec. 14, 1830, p. 444.

— See *Trust*, 2.

FEE OR LIFE RENT.—Clause of a deed held (affirming the judgment of the Court of Session), to create a trust, so as to carry the fee to child-



- ren, and a liferent to the father.—*MEIN v. TAYLORS and Others*, Feb. 23, 1830, p. 22.
- FERRY.—Held (affirming the judgment of the Court of Session), that steam-boats, carrying only passengers and their baggage, fall within the description of 'Ferry-boats or passage-boats,' in the statute, 28 Geo. III. c. 58, and relative tables regulating the dues exigible at Leith and the adjacent bounds, and are liable only to pay rates as such.—*MAGISTRATES OF EDINBURGH, &c. v. M'FARLANE and Others*, March 30, 1830, p. 76.
- FOREIGN.—Judgment having been pronounced in a competent Court in the United States of America, finding a Scottish legatee entitled to a legacy under a settlement executed in the United States of America by a Scotchman domiciled there;—Held (affirming the judgment of the Court of Session), That, under the circumstances, an offer to prove by the opinion of American counsel, that the clause in the settlement conveying the legacy did not import a right of fee, but only of liferent, was inadmissible.—*BROWN v. BROWN*, March 3, 1830, p. 28.
- See *Parent and Child. Appropriate and Reprobate. Res Judicata.*
- FRAUD.—Where a daughter had rights under her father and mother's contract of marriage, and the father, at a time when she and her husband had just attained majority, were in pecuniary distress, and the husband was about to sail to India, obtained a discharge from them without the assistance of an agent on their part; and the discharge narrated that it was granted in consideration of £315, agreed to be given by the father out of his own free-will, and from regard to his daughter and husband, (whereas he entertained different sentiments,) and that one half had been instantly paid, (whereas he retained a large part in extinction of an alleged debt, and only gave a promissory-note at twelve months for the balance;) and the other half was to be payable at his death: Held (reversing the judgment of the Court of Session) that the discharge was not binding.—*EWEN v. EWEN'S TRUSTEES*, Nov. 17, 1830, p. 346.
- See *Executor.*
- HARBOUR.—See *Ferry.*
- HERITABLE OR MOVEABLE.—Where a party sold heritable subjects by missives, and the price, payable at a future period, was declared a burden on the subjects;—Held (affirming the judgment of the Court of Session), that the price was heritable, and not carried by an English testament.—*MEAD v. ANDERSON*, Nov. 16, 1830, p. 328.
- HUSBAND AND WIFE.—See *Parent and Child.*
- INSURANCE.—Found (affirming the judgment of the Court of Session), that a policy of insurance 'to Barcelona, and at and from thence, and two other ports in Spain,' &c., covered a total loss, which happened while the ship insured lay in the roadstead of Saloe, although there were no artificial works or other usual protections for loading and unloading; but the place was resorted to by vessels for trade, and it was treated as a port by the Spanish and British Governments.—*SEA INSURANCE COMPANY OF SCOTLAND v. GAVIN and Others*, Feb. 18, 1830, p. 17.
- INTEREST.—Circumstances in which it was held (reversing the judgment of the Court of Session), that a party was not liable for compound interest on an heritable bond granted in 1787, and for payment of which action was raised in 1814, but not proceeded in till 1824, although the delay was alleged to have been caused by the improper acts of the debtor.—*M'NEILL v. M'NEILL or JOLLY, &c.* Dec. 22, 1830, p. 455.

INTEREST.—See *Appeal*.

JURISDICTION.—Question remitted for the opinion of all the Judges, Whether, where a party, accused of evading a toll-bar, has been assoilized by the Justices of Peace from a demand for statutory penalties, the Court of Session has jurisdiction, in an advocacy, to find him guilty, and award the penalties.—MORRISON, &c. v. MITCHELL, July 14, 1830, p. 162.

LANDLORD and TENANT.—1. On a question of fact, relative to a tenant's liability for a year's rent, the House of Lords (affirming the judgment of the Court of Session) held the tenant not to be liable.—THOMSON v. FORRESTER, June 18, 1830, p. 136.

2. Held (affirming the judgment of the Court of Session), 1. That a bona fide purchaser from a tenant of part of his crop, which has been delivered and paid for, is liable in second payment to the landlord where the rent of that crop has not been paid; and, 2. That the purchaser is not protected, although the contract of sale be made by sample in public market.—DUNLOP and Co. v. DALHOUSIE, Dec. 7, 1830, p. 420.

See *Bona, or Mala Fides*, 2.

MUTUAL CONTRACT.—Construction of letters constituting a mutual contract between merchants.—GUTHRIE and Others v. ANDERSON and Others, Feb. 18, 1830, p. 20.

PACTUM ILLICITUM.—Question raised, whether a commercial transaction between parties in Great Britain and America, pending war, or on the eve of war between these countries, was pactum illicitum?—M'GAVIN v. STEWART, July 14, 1830, p. 184.

PARENT and CHILD.—Where a Scotchman by birth, who was heir of entail in possession, and proprietor of estates in Scotland, but in early life settled in England, making occasional visits to Scotland, had, by an illicit connexion with an Englishwoman, a son born to him in England, and afterwards came to Scotland with the child and mother, where, after a residence of fifteen days, he married her; and they remained in Scotland about two months, visited his estates, and returned to England with the child, where they remained until his death;—Found, (reversing the judgment of the Court of Session), that the child was not entitled to the benefit of legitimation by the subsequent marriage of his parents.—ROSE v. ROSS, July 16, 1830, p. 289.

PARISH.—A committee of heritors, appointed by the Court of Session to build a church and assess the heritors, having been obliged to raise money on their bills to meet deficiencies by the failure of heritors to pay;—Held (affirming the judgment of the Court of Session), that the Committee were entitled to relief against an heritor pro rata, although he had paid his full share of the assessment.—FORBES, &c. v. SHAW, &c. July 22, 1830, p. 300.

PARTNERSHIP.—See *Proof*, 1.

Circumstances in which it was held (reversing the judgment of the Court of Session), that a question, whether a Company had been dissolved and goods sold to a partner or not, should be submitted to a jury, and the parties examined before the Jury Court, notwithstanding that the dissolution had been publicly advertised, and the invoices and bills of lading set forth that the goods were the property of the partner.—M'GAVIN v. STEWART, July 14, 1830, p. 184.\*

\* In this case the House afterwards amended the judgment. See end of the Report.

PASSIVE TITLE.—See *Adjudication*.

PAYMENT.—See *Presumption*, 1.

PERSONAL OBJECTION.—See *Repetition*. *Title to Pursue*, 1, 2.

POOR.—A pauper who was found guilty of theft before the Court of Justiciary, but insane at the time of committing it, having been ordained to be confined in jail, or delivered to his friends under the usual conditions; and having been sent by the magistrates of the burgh, and the Commissioners of Supply of the county within which the jail lay, to a lunatic asylum;—Held (reversing the judgment of the Court of Session), that the Officers of State were not liable for the expense of his maintenance in jail and the asylum, down to the period when, having recovered sanity, he obtained a remission from the Crown.—*OFFICERS OF STATE v. COMMISSIONERS OF SUPPLY OF WIGTON-SHIRE*, March 10, 1830, p. 43.

POSSESSION.—Circumstances in which (affirming the judgment of the Court of Session) the presumption of property arising from possession was held to be overcome.—*TURNER v. GIBB and MACDONALD*, July 7, 1830, p. 154.

PRESUMPTION.—1. Held (affirming the judgment of the Court of Session), that, in the circumstances of the case, two promissory-notes, although found in the possession of the debtor, were to be regarded as renewals of unretired bills, and not payments.—*BROWN v. PATERSON'S TRUSTEES*, March 25, 1830, p. 57.

2. Circumstances under which a gratuitous bond of annuity, granted by one brother to another, during the joint lives of the parties, found in the custody of a person who was the ordinary agent of the granter, and had also acted as agent for the grantee, was held (affirming the judgment of the Court of Session), to be a delivered deed.—*MAULE v. RAMSAY*, March 25, 1830, p. 58.

3. Circumstances under which it was held (affirming the judgment of the Court of Session), that a bond which had been destroyed, was to be presumed unconditional.—*BUTE v. COOPER*, Nov. 17, 1830, p. 335.

See *Possession*.

PROCESS.—1. An order to consign in the Royal Bank a disputed sum, sustained.—*BROWN v. PATERSON'S TRUSTEES*, March 25, 1830, p. 57.

2. A charter not produced or founded on in the Court below, not permitted to be referred to in the House of Lords.—*GOVERNORS of HERIOT'S HOSPITAL v. McDONALD*, April 7, 1830, p. 98.

3. Competent for the House of Lords, on an appeal against a judgment of the Court of Session disallowing an exception, to take the whole cause into consideration.—*ALLARDICE, &c. v. ROBERTSON*, April 8, 1830, p. 102.

4. On a recommendation by the House of Lords, a question of disputed accounting for work done settled by amicable adjustment of parties, and the adjustment made the subject of the order and adjudication of the House.—*WHITEHEAD v. ROWAT*, April 8, 1830, p. 121.

5. Where the Court of Session rejected the vote of a Judge who had not been present at a hearing in presence, but considered the subsequent written pleadings; and would not require the opinion and vote of a Judge who declined, in consequence of having been leading counsel for the pursuer;—the House of Lords affirmed the judgment.—*INNES v. EXECUTORS OF ALEXANDER DUKE OF GORDON*, Nov. 10, 1830, p. 305.

PROCESS, (Continued.)—6. Held (reversing the judgment of the Court of Session,) that under the A. S. 12th Nov. 1825, it is imperative to remit a petition and complaint against the judgment of a trustee on a bankrupt estate to the Lord Ordinary, where facts require to be investigated.—M'TAGGART v. JEFFREY, Nov. 24, 1830, p. 361.

— See *Partnership, Title to Pursue*, 2.

PROOF.—1. Held (affirming the judgment of the Court of Session), that private books of accounts, kept by one partner, containing, among other entries, memoranda relative to company affairs—there being no evidence that the books had been seen by the other partner—could not be received as evidence against the representatives of the latter partner.—SMITH v. MITCHELL, March 10, 1830, p. 47.

— 2. Incompetent to control the terms of a written contract by an extrinsic document.—PENTLAND v. GWYDYR, Nov. 12, 1830, p. 322.

— 3. Observed, that hearsay evidence and parole testimony, as to the contents of a letter not alleged to be destroyed, ought to be struck out of a proof taken on commission.—MORTON v. HUNTERS and Co., Nov. 26, 1830, p. 379.

— See *Possession. Partnership*.

PROVING OF THE TENOR.—See *Presumption*, 3.

PUBLIC OFFICER.—Circumstances under which the Court of Session, having suspended a depute-clerk of the peace, and prohibited him from exercising the duties or drawing the emoluments of the office for twelve months, found him liable in expenses, and ordained the deliverance to be inserted in the Books of Sederunt,—the House of Lords remitted to the Court to recall the interlocutor, except as to payment of the expenses; and ordered the party to pay the costs of appeal, declaring that the House awarded such costs in lieu of such suspension.—CAMPBELL v. M'FARLANE, April 8, 1830, p. 123.

PUBLIC POLICE.—Held (reversing the judgment of the Court of Session), that a clause in the Police Act of Dumfries, authorizing the Commissioners to remove obstructions, did not warrant them, for the purpose of widening the entrance to a street, to remove a tenement which did not encroach on or obstruct the line of the other houses.—NEWALL, &c. v. COMMISSIONERS of POLICE of DUMFRIES, June 21, 1830, p. 137.

RELIEF.—See *Parish*.

REPARATION.—1. Held (affirming the judgment of the Court of Session), that superiors who had feued out ground for building to a considerable extent in streets, and constructed a common sewer or drain for the use of the streets, and, long subsequent to the conveyance of the feus, acknowledged dominion over the drain by stipulating with a third party to keep it in repair, were liable for damage occasioned by the disrepair of the drain.—MAGISTRATES of EDINBURGH and Others v. DICKSONS BROTHERS, Feb. 17, 1830, p. 1.

— 2.—1. Held (affirming the judgment of the Court of Session), that a Justice of Peace is not protected against an action of damages for a verbal slander, averred to have been made maliciously in delivering judgment against a party under trial before him; but, 2. Held (reversing the judgment), that the malice is not to be inferred from the words used, but must be proved.—ALLARDICE, &c. v. ROBERTSON, April 8, 1830, p. 102.

— 3. Held (affirming the judgment of the Court of Session), that a law agent, employed to prepare a security over a land estate, having inserted an obligation in the bond to infest a me, and neglected to get it and the sasine confirmed, whereby the security became un-

availing, was liable in reparation to the client.—*STEVENSON v. ROW-AND*, July 14, 1830, p. 177.

**REPETITION.**—Held (reversing the judgment of the Court of Session), 1. That where a payment has been made in virtue of a decree in absence and diligence thereon, repetition cannot be ordered so long as the decree and diligence are not set aside; 2. That it is not relevant to entitle a party to repetition, to allege that he has paid under a mistake in point of law; and, 3. That a party who has had the means of knowing the facts before making a payment, and seeks reparation on an allegation that he paid under a mistake in point of fact, may be barred from claiming repetition.—*WILSON, &c. v. SINCLAIR*, Dec. 7, 1830, p. 398.

— See *Entail*, 3.

**RES JUDICATA.**—Circumstances in which it was held (affirming the judgment of the Court of Session), that a decree pronounced in reference to a question of English law, on the motion of the party challenging it, constituted *res judicata*, although he alleged that he had acted under erroneous information as to the law of England.—*MACALLISTER v. MACALLISTER and Others*, June 23, 1830, p. 142.

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**RIGHT IN SECURITY.**—See *Sasine*.

**ROAD.**—See *Jurisdiction*.

**SALE.**—Construction of the terms of a contract of sale.—*PENTLAND v. GWYDYR*, Nov. 12, 1830, p. 322.

— See *Landlord and Tenant*, 2.

**SASINE.**—Held (affirming the judgment of the Court of Session), 1. That the omission of the Christian name of the Bailie, where his surname and place of residence is given, is no objection to a sasine; 2. That although the Christian name of a witness be written on an erasure in the instrument of sasine, it is no objection to it; and, 3. That a sasine proceeding on an heritable bond for a cash credit for £5000, and three years' interest thereon, at the rate of five per cent, is good.—*MORTON v. HUNTERS and Co.*, Nov. 26, 1830, p. 379.

**SEQUESTRATION.**—See *Bankrupt*.

**SERVICE.**—Held (reversing the judgment of the Court of Session), that a general service to an ancestor, where there has been a prior general service by another party to the same ancestor, is incompetent.—*COCHRANE v. RAMSAY*, April 29, 1830, p. 128.

**SERVITUDE.**—See *Burgh Royal*.

**STATUTE.**—See *Public Police*.

— 28 Geo. III, c. 58.—See *Ferry*.

**STATUTES** 33 Geo. III. c. 138; 4 Geo. IV. c. 49.—See *Jurisdiction*.

**SUPERIOR and VASSAL.**—Where a vassal was bound, in a feu-contract, to relieve the superior, and the lands, houses, teinds, and feu-duties, of and from all multures which could be claimed furth thereof, 'and that for all other burden, exaction, question, demand, or secular service, which can any ways be exacted or demanded' for the same; and the feu-duty was equivalent to the rent of the lands; and the superior, from the date of the contract (a period more than 40 years), paid the minister's stipend; found (affirming the judgment of the Court of Session), that the superior could not throw the burden of stipend upon the vassal.—*GOVERNORS of HERIOT'S HOSPITAL v. M'DONALD*, April 7, 1830, p. 98.

— See *Reparation*, 1.—*Burgh Royal*.

**TESTAMENT.**—Where a trust-deed of settlement for the foundation of an hospital for boys, was blank as to the sum to be provided, and the

number of boys to be admitted ;—Held (reversing the judgment of the Court of Session), that it was inept.—*EWEN v. EWEN'S TRUSTEES*, Nov. 17, 1830, p. 346.

**TITLE TO PURSUE.**—1. Circumstances of confidence between the seller and purchaser of an estate burdened with a bond, found to be no bar to the title of the purchaser to challenge the bond on the head of usury.—*FARQUHARSON v. BARSTOW*, Feb. 17, 1830, p. 9.

2. A party called as heir to A, under a deed executed by B, having libelled his title to reduce a death-bed deed executed by A as heir of provision of B, held (affirming the judgment of the Court of Session), 1. That he had no title in that character to reduce A's deed ; and, 2. That the defender was not barred from stating the objection, although he had joined issue on the merits, and a proof had been taken.—*COGAN v. LYON and Others*, Dec. 4, 1830, p. 391.

— See *Trust*, 2.

**TRUST.**—1. Six trustees having been appointed under a deed of settlement, and any three declared to be a quorum while so many were alive ; and all having accepted ; but one having objected to a loan of part of the trust-funds, and declared he would no longer act ; and the number having been reduced, including the objector, to three ; and he having refused to concur in the discharge required on the loan being repaid,—held (affirming the judgment of the Court of Session), that he was bound to concur both in that and in all future proper and necessary acts of administration.—*OUCHTERLONY v. LYNEDOCHE and M'DONALD*, July 7, 1830, p. 148.

2. A person having conveyed a right in a depending action to trustees and their assignees ; and the trustees having died without assigning ; and the next of kin (who was interested in the subject of the trust) having confirmed as executor to the truster ; and a creditor of the next of kin having adjudged the right,—held (affirming the judgment of the Court of Session), that the creditor had a good title to pursue the action.—*KIRKPATRICK v. INNES and GAVIN*, March 17, 1830, p. 48.

— See *Executor*.

**USURY.**—Where L.12,000 of Government stock, of the value of L.7620, were sold for an heritable bond of L.10,000, with interest thereon at 5 per cent ; but the payment of the principal was dependent on, and substantially effected by several contingencies ; and, in one view, the seller and her heirs were exposed to receive for a perpetuity less than 5 per cent on the sum sold ;—held (affirming the judgment of the Court of Session), that the transaction was not usurious.—*FARQUHARSON v. BARSTOW*, Feb. 17, 1830, p. 9.

**WARRANTICE.**—See *Adjudication*.

**WRIT.**—See *Sasine. Testament*.













- The Magistrate, as superior, liable for bad Rains.
7. ~~Grant~~ of trustee; if the subject personal, it lapses to the trustee next of kin confirming, qua trustee.
  12. Ignorance or Error as to Law, - §409.
  17. Trustee must Act & cannot renounce.
  18. Permitting money from India.
  16. Denunciation of rights reduced as fraudulent.
  61. Discharge of all Notes does not include Contingent & engagements.
  - 18 of Appendix, - Satisfaction explained.
  22. A written Contract cannot be controverted by extrinsic note or writing.
  85. Latent ambiguities explained.
  88. Hearsay evidence.
  84. Jury - judicial to dismiss where the libellous, though proposed, is plainly insufficient.
  98. When Reduction necessary of a decree in absence.
  64. Approbate & Reprobate.

